16-3877-cv

U.S. Court of Appeals for the Second Circuit

JAMES G. PAULSEN, Regional Director of Region 29
of the National Labor Relations Board for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee-Cross-Appellant

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF AND SPECIAL APPENDIX OF
DEFENDANT-APPELLANT-CROSS-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

PrimeFlight Aviation Services, Inc. ("PrimeFlight") is a wholly owned subsidiary of SMS Holdings Corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court concluded it had jurisdiction over this action filed under Section 10(j) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(j). PrimeFlight denies that it is covered by the NLRA and therefore denies such jurisdiction was proper. The district court issued its preliminary injunction order on October 24, 2016, and PrimeFlight timely filed its notice of appeal on November 17, 2016. The district court terminated the case by docket entry on January 1, 2017, deeming its preliminary injunction decision a dispositive order. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

STATEMENT OF ISSUES PRESENTED

Did the district court err by entering a preliminary injunction under Section 10(j) of the NLRA ordering PrimeFlight to recognize and bargain with a union with which PrimeFlight had no prior relationship where there is no reasonable cause to believe that PrimeFlight is covered by the NLRA, that it has committed an unfair labor practice, or that an injunction is necessary to maintain the status quo pending a final decision by the National Labor Relations Board ("Board" or "NLRB")?

STATEMENT OF THE CASE

I. Procedural History

On September 26, 2016, James G. Paulsen, the Regional Director of Region 29 of the NLRB ("Petitioner" or "Regional Director"), petitioned the U.S. District Court for the Eastern District of New York to preliminarily enjoin PrimeFlight under Section 10(j) of the NLRA. [Doc. 1.] Petitioner sought this injunction pending a decision by an NLRB Administrative Law Judge on an unfair labor practice charge that alleges PrimeFlight violated the NLRA by refusing to recognize and bargain with the Service Employees International Union Local 32BJ ("SEIU 32BJ" or the "Union"). On that same date, Petitioner also moved the district court to try the petition on the basis of affidavits and other documentary evidence and without conducting an evidentiary hearing. [Doc. 2.]

The district court conducted oral argument on the petition on October 11, 2016. At the outset of that argument, the court orally granted, without objection, Petitioner's motion to try the petition on the basis of affidavits and other evidentiary evidence. (Tr. of Oct. 11, 2016 ("Tr.") at 4:15-25.)

On October 24, 2016, the district court issued its Memorandum Decision and Order [Doc. 24] granting the petition in part. That decision is reported at *Paulsen v. PrimeFlight Aviation Servs., Inc.*, No. 16 CIV. 5338 (BMC), 2016 WL 6205796, --- F. Supp. 3d. ---- (E.D.N.Y. Oct. 24, 2016) (Cogan, *J*). The Court's Preliminary Injunction [Doc. 25] orders that PrimeFlight:

> shall immediately recognize [the Union] as the interim collective-bargaining representative of its employees in the following unit: all full-time and regular part-time employees employed by PrimeFlight at Terminal Five at JFK Airport, excluding confidential employees, office clericals, guards, and supervisors, as defined by the [NLRA].

(Prelim. Inj. ¶ 1.)

The preliminary injunction also requires PrimeFlight to "immediately commence bargaining in good faith with the Union" subject to two conditions. First, any agreement between PrimeFlight and the Union would be "subject to termination if the NLRB determines that PrimeFlight is not subject to the NLRA or did not violate any provisions therein." (*Id.* ¶2(a).) Second, the preliminary injunction provides:

> Any agreement reached between PrimeFlight and the Union may not include minimum shift or employee requirements so

> that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's express employment needs.

(*Id.* ¶ 2(b).) The preliminary injunction further required PrimeFlight to produce certain information to the Union, post the preliminary injunction, and demonstrate its compliance. (*Id.* ¶¶ 3-5.) PrimeFlight timely filed its notice of appeal on November 17, 2016. [Doc. 28.]

On November 21, 2016, the Regional Director filed an Emergency Motion to Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) ("Motion to Amend") [Docs. 29 & 29-1], asking the Court to delete Paragraph 2(b) from the Preliminary Injunction.[1] The Court issued its Memorandum Decision and Order [Doc. 34] on December 13, 2016, denying that motion.

On December 1, 2016, PrimeFlight moved the district court to stay its preliminary injunction pending resolution of this appeal, which the court denied by Memorandum Decision and Order [Doc. 36] dated December 29, 2016. The Regional Director filed his Notice of Cross-Appeal on January 3, 2017. [Doc. 37.]

[1] The Regional Director also asked the Court to add a provision requiring PrimeFlight to cease and desist from failing to meet its statutory bargaining obligations. (*Id.)*

II. Facts

PrimeFlight is a wholly-owned subsidiary of SMS Holdings. (Affidavit of Matthew Barry ("Barry Aff.") ¶ 1.) PrimeFlight provides airline support services, including ground handling and terminal services, at airports around the country, including JFK Airport in Queens, New York. (Barry Aff. ¶ 2.)

A. PrimeFlight's Operations at JFK Providing Services to JetBlue Previously Rendered by AirServ and PAX Assist

PrimeFlight provides wheelchair assistance, baggage handling assistance, and passenger queue services under a contract with JetBlue Airlines at JFK, employing approximately 500 employees there. (Barry Aff. ¶¶ 4, 5.) PrimeFlight provides these services under the terms of a General Terms Agreement ("GTA") executed by PrimeFlight and JetBlue, as well as a Statement of Work ("SOW") appended to the GTA. (Affidavit of Carol Doezema (hereinafter referred to as "Doezema Aff.") ¶¶ 2, 3, Exhs. 1 and 2.)

JetBlue is an airline carrier providing transport for passengers and cargo among various airports in the United States and internationally. (Barry Aff. ¶ 3.) PrimeFlight currently provides service at JFK to JetBlue, Hawaiian Airlines, Aer Lingus, and TAP- Portugal

Air, but PrimeFlight's services to Hawaiian, Aer Lingus, and TAP all fall under PrimeFlight's contract with JetBlue. (Barry Aff. ¶¶ 6, 22.)

PrimeFlight commenced operations at JFK on May 9, 2016 after successfully bidding on certain services previously provided to JetBlue by AirServ Corporation and PAX Assist. (Barry Aff. ¶ 4.) These services included baggage handling, skycap, checkpoint services (previously provided by AirServ) and wheelchair assistance (previously provided by PAX Assist). (Barry Aff. ¶¶ 5 & 23.)

The first phase of PrimeFlight's hiring of employees at JFK occurred in April 2016, prior to PrimeFlight's beginning operations. (Barry Aff. ¶¶ 4, 24 & Exh. 1.) Upon beginning operations, PrimeFlight determined it needed to increase staff drastically, and it decided to increase its workforce to approximately 500 employees with two additional phases of hiring. (Barry Aff. ¶ 4.) The second phase of hiring occurred in early June 2016, and the third phase in mid- and late June 2016. (Barry Aff. ¶¶ 4, 24 & Exh. 1.)

When PrimeFlight began operations on May 9, 2016, it had hired 362 employees in total. (Mem. Decision & Order [Doc. 24] ("Mem. Decision") at 3.) Of these, 189, or 52%, were former AirServ employees.

(*Id.*) By June 16, 2016, PrimeFlight's workforce had increased to 440 employees, of whom 197 were former AirServ employees. As of that date, other individuals hired by PrimeFlight, not former AirServ employees, constituted a majority of PrimeFlight's employees. The former AirServ employees made up approximately 44% of PrimeFlight's workforce and had constituted a majority for less than one month. (Barry Aff. ¶ 27 & Exhibit 3.) By July 2016, PrimeFlight employed 507 employees, of whom only 39.4% were former AirServ employees. (Barry Aff. ¶ 28.)

B. PrimeFlight's Essential Airline Services to JetBlue

Since commencing operations at JFK on May 9, 2016, and continuing to today, PrimeFlight has provided various services directly to passengers of JetBlue at JFK at the request of the airline. (Barry Aff. ¶ 5.) PrimeFlight provides two types of baggage services, including curbside baggage check-in, also known as "Skycap" service, and traditional baggage handling inside the terminal where JetBlue operates. (Barry Aff. ¶ 5(a) and (b); Doezema Aff. ¶ 3 & Exh. 2 at 23-24, 26.) Skycaps are luggage porters who accept passenger baggage at the curb as passengers are dropped off during the check-in process. (Barry

Aff. ¶ 5(a).) Baggage handlers move and process passenger baggage at the JetBlue ticket counter and the JetBlue baggage claim areas, as well as placing oversized baggage on the appropriate conveyor belt and arranging for delivery of international customs baggage on a separate conveyor belt.[2] (Barry Aff. ¶ 5(b).)

PrimeFlight also provides Wheelchair Services for JetBlue passengers requiring wheelchair transport in moving through the terminal. (Barry Aff. ¶ 5(d); Doezema Aff. ¶ 3 & Exh. 2 at 24.) PrimeFlight also provides employees for Line Queue Monitoring, providing line monitors for the passenger lines at security checkpoints run by the Transportation Safety Administration and line monitor "ambassadors" in the JetBlue customs hall for international flights. (Barry Aff. ¶ 5(c); Doezema Aff. ¶ 3 & Exh. 2 at 26.) These ambassadors direct passengers to the proper customs agent. (Barry Aff. ¶ 5(c).)

C. JetBlue's Control of PrimeFlight's Business at JFK

JetBlue exercises substantial control over PrimeFlight's JFK operations. The job duties of the PrimeFlight employees working at JFK are determined by PrimeFlight's agreement with JetBlue to provide the

[2] The SOW between JetBlue and PrimeFlight contains detailed descriptions of the Skycap and Baggage Handling Services. (Doezema Aff. ¶ 3 & Exh. 2 at 23-24, 26.)

functions described above. In addition to the tasks performed, the work environment, supervision, hours, workload, training, clothing, and work records of PrimeFlight employees are under the direct control of JetBlue.

Physical Space: PrimeFlight's employees work in physical space controlled by JetBlue, performing their duties in JFK's Terminal 5 to support JetBlue's airline operations. (Barry Aff. ¶ 10.) PrimeFlight has no physical space of its own at JFK and relies on JetBlue for office space. (Barry Aff. ¶ 10.) JetBlue also provides and controls the locker room where PrimeFlight employees store their personal belongings while at work, as well as the break room where PrimeFlight employees take their breaks. (Barry Aff. ¶ 10.)

Work Schedules and Hours: Because PrimeFlight's employees provide direct services to JetBlue passengers, PrimeFlight builds its employees' schedules and hours based on the demands communicated by JetBlue. JetBlue provides PrimeFlight with a flight schedule on a monthly basis. (Barry Aff. ¶ 7.) JetBlue advises PrimeFlight of the number of flights JetBlue will have each day, how many wheelchair passengers JetBlue expects, and what times during the day

PrimeFlight's employee positions need to be covered, including the ticket counter, security checkpoint, and baggage handling. JetBlue has an expectation for the minimum number of workers for each position, which leads directly to how many people PrimeFlight schedules and how many hours are scheduled. (Barry Aff. ¶ 8.) A few PrimeFlight positions are static, meaning the same hours are expected each day, but most are non-static and require more personnel during busy times and fewer or none at other times of day. (Barry Aff. ¶ 7.) Wheelchair positions are all non-static, and wheelchair assistance involves about half of PrimeFlight's JFK employees. Many of the non-wheelchair positions are also non-static, so the variable hours positions are well over 50% of the employee complement. (Barry Aff. ¶ 7.) JetBlue management coordinates with PrimeFlight's supervisors on a daily basis to ensure that PrimeFlight provides the necessary wheelchair, line monitoring, and baggage services.[3] (Barry Aff. ¶ 21.)

[3] JetBlue's reimbursements to PrimeFlight under the services contract inform the compensation of PrimeFlight employees, but JetBlue does not set wage levels. JetBlue pays PrimeFlight a flat rate for every flight, which must cover the wages and benefits of the employees. PrimeFlight sets its employees' wages and benefits, but those are determined based on JetBlue's reimbursement rate and volume to PrimeFlight. (Barry Aff. ¶ 8.)

Staffing Levels: JetBlue tracks the work performed by PrimeFlight employees on a real-time basis to ensure appropriate staffing levels. PrimeFlight is required to provide JetBlue with regular reports showing the number of wheelchair "transactions." (Barry Aff. ¶ 14.) The PrimeFlight system tracks all wheelchair requests, with PrimeFlight employees carrying a tablet to scan the boarding passes of passengers. This data is aggregated for JetBlue. (Barry Aff. ¶ 14.) PrimeFlight provides JetBlue three shift reports each day on the number of PrimeFlight employees working. JetBlue can demand that more people be staffed on shifts in order to provide the level of service desired by JetBlue for its passengers. (Barry Aff. ¶ 14.)

JetBlue also provides wheelchair demand information to PrimeFlight through an electronic system that tells PrimeFlight how many wheelchairs are coming in on each flight. (Barry Aff. ¶ 9.) JetBlue updates that information based on passenger requests and check-ins, and PrimeFlight assigns Wheelchair Services Staff to cover those needs. (Barry Aff. ¶ 9.)

The GTA expressly requires that PrimeFlight maintain staffing to JetBlue's satisfaction:

> The parties acknowledge that JetBlue's flight activity may increase or decrease over the duration of the Term, and that it will be the responsibility of PrimeFlight to maintain appropriate levels of personnel and equipment to perform the Services in strict accordance with this Agreement, regardless of any such activity.

(Doezema Aff. ¶ 2 & Exh.1 at 9.1.)

Workplace Supervision: As a general matter, JetBlue requires that PrimeFlight "perform the Services [under their agreements] in strict compliance with JetBlue's standards governing, among other things, the Services and safety procedures in effect or as hereafter given in writing to [PrimeFlight] from time to time." (Doezema Aff. ¶ 2 & Exh.1 at 7.4.) JetBlue also requires PrimeFlight "to participate in JetBlue's Business Partner Oversight Program ('BPOP') and close or address all open findings/observations per the BPOP process." (Doezema Aff. ¶ 2 & Exh.1 at 7.5.)

In addition, JetBlue supervisors and managers interact with PrimeFlight employees during each work day. They have authority to direct the work of PrimeFlight employees and do so on a daily basis. (Barry Aff. ¶ 17.) PrimeFlight employees respond directly to JetBlue management's radio calls for passenger services in the terminal. (Barry Aff. ¶ 17.) PrimeFlight has agreed with JetBlue that JetBlue can have

a PrimeFlight employee removed from working on the JetBlue contract. (Barry Aff. ¶ 22.) For example, the GTA provides:

> If, at any time, any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the Services are performed, [PrimeFlight] shall take such reasonable steps as shall be necessary to resolve such dispute *including but not limited to the removal and replacement of employees or agents*.

(Doezema Aff. ¶ 1 & Exh.1 at 7.6 (emphasis added).) In such cases, PrimeFlight has no real option other than to discharge the employee, as JetBlue has authority over all of PrimeFlight's business contracts at JFK. If JetBlue directs the removal of an employee, PrimeFlight does not have an option to transfer that employee to another assignment. (Barry Aff. ¶ 22.)

Rules of Conduct: JetBlue's SOW with PrimeFlight imposes rules of conduct which PrimeFlight employees must observe in executing their duties at JetBlue's operation. For example, Skycaps must be "professionally dressed and neatly groomed." (Doezema Aff. ¶ 3 & Exh. 2 at p. 24.) The SOW further imposes restrictions on how Skycaps handle financial transactions and issue documentation to passengers. (Doezema Aff. ¶ 3 & Exh. 2 at p. 24.)

JetBlue's SOW provides further requirements regarding PrimeFlight employees' conduct. For example, the SOW states with respect to wheelchair services employees:

> 3. Business Partner shall ensure that its employees do not do any of the following:
>
> 3.1 Leave any customer at a gate until customer is onboard aircraft *unless otherwise directed by JetBlue's General Manager at JFK*;
>
> 3.2 Push more than one (1) wheelchair at a time, *unless otherwise directed by JetBlue*;
>
> 3.3 Appear to be on cell phones for personal use;
>
> 3.4 Sleep or appear to be sleeping in any customer facing area the JFK;
>
> 3.5 Log-in for their shift and be on the clock when the employee is not located at JFK.

(Doezema Aff. ¶ 3 & Exh. 2 at p. 25 (emphasis added).)

Baggage Handlers are required by JetBlue to dress and groom themselves appropriately. (Doezema Aff. ¶ 3, Exh. 2 at p. 26.) The GTA further provides, "[PrimeFlight] shall enforce strict discipline and good order among its employees, to maintain and observe sound and harmonious business practices, and to take all reasonable steps to avoid labor disputes ...." (Doezema Aff. ¶ 2, Exh. 1 at 7.6.)

Work Equipment: JetBlue provides PrimeFlight with the radios, wheelchairs, computers, baggage carts, and the technology platform used by PrimeFlight to provide services. (Barry Aff. ¶ 11.) The SOW specifically provides that Skycap services will use JetBlue's "Sabre System" for logging in customers and related activities. (Doezema Aff. ¶ 3, Exh. 2 at 25.) PrimeFlight skycaps use the Sabre computers to perform curbside check-in, and PrimeFlight wheelchair dispatchers use them to retrieve information about passengers who will need wheelchair assistance. (Barry Aff. ¶ 13.) This is the sole means of computer access for these job duties. (Barry Aff. ¶ 13.) As a result, nearly all the equipment used by PrimeFlight employees for their work belongs to and is controlled by JetBlue. JetBlue also provides and controls the storage for all of this equipment. (Barry Aff. ¶ 10.)

Employee Training and Meetings: JetBlue imposes detailed training requirements for PrimeFlight's employees. (Doezema Aff. ¶ 2 & Exh.1 at 8.) JetBlue requires that PrimeFlight provide its employees with all initial and recurrent training, including on JetBlue policies. PrimeFlight employees must also complete JetBlue curriculum training. (Barry Aff. ¶ 15.) The GTA specifies that PrimeFlight "will

send employees to JetBlue University ("JBU") for 'Train the Trainer' training ...." (Doezema Aff. ¶ 2, Exh. 1 at 8.1.) PrimeFlight's trainers "must complete the [JetBlue] training in order to be qualified to give training to [PrimeFlight] employees to perform the Services" under the agreements. (Doezema Aff. ¶ 2 & Exh.1 at 8.2.) PrimeFlight's trainers also must complete recurrent training with JetBlue and, if they fail to do so in a timely manner, "shall be removed as a [PrimeFlight] Trainer and will no longer be eligible to be a trainer for JetBlue in the future (modifiable at the sole discretion of JetBlue)." (Doezema Aff. ¶ 2 & Exh.1 at 8.3 & 8.3.2.) PrimeFlight's trainers must then ensure that every PrimeFlight employee receives "the required JetBlue provided curriculum initial training ... prior to the employee performing any function on the behalf of JetBlue ...." (Doezema Aff. ¶ 2 & Exh. 1 at 8.6.)

PrimeFlight employees also regularly attend employee meetings conducted by JetBlue, including operations meetings occurring every day at 10:30 am. PrimeFlight employees also attend other JetBlue meetings relating to safety, new programs, special events, and coordination of services. (Barry Aff. ¶ 18.)

Record-Keeping and Auditing: JetBlue has the right to inspect and audit PrimeFlight's "books, records, and manuals ... at all times." (Barry Aff. ¶ 19; Doezema Aff. ¶ 2 & Exh. 1 at 13.1, 13.2.) PrimeFlight is required by contract to provide JetBlue with copies of training records, workplace accidents and injury records, employee grievances, and employee disciplinary actions upon JetBlue's request. (Barry Aff. ¶ 16; Doezema Aff. ¶ 3 & Exh. 1 at ¶ 7.3) JetBlue has a contractual right to audit and inspect the provision of services provided by PrimeFlight at JFK. (Barry Aff. ¶ 20.) PrimeFlight is also required to provide records of incidents and accidents involving PrimeFlight's employees. (Barry Aff. ¶ 20.)

Uniforms: The clothing worn by PrimeFlight employees is under the direct control of JetBlue. Prior to commencing work on the contract at JFK, PrimeFlight first had to receive approval from JetBlue's branding department regarding the uniforms PrimeFlight employees were to wear. JetBlue continues to exercise control over this issue. If PrimeFlight changes its uniforms, PrimeFlight must get approval from JetBlue. (Barry Aff. ¶ 12.)

D. The Differences Between PrimeFlight's and AirServ's Scope of Services and Workforce

As noted above, PrimeFlight agreed to provide Wheelchair Services to JetBlue, which previously were provided by PAX Assist, not AirServ. When PrimeFlight assumed operations for JetBlue effective May 9, 2016, PrimeFlight determined it would employ approximately 500 employees, about half of whom (245) would be in Wheelchair Services. (Barry Aff. ¶ 25.) The majority of Wheelchair Services employees hired by PrimeFlight did not come from AirServ. (Barry Aff. Exhibit 3 (listing employees hired by PrimeFlight from AirServ and position for which hired).) Although some former AirServ employees were hired by PrimeFlight to provide Wheelchair Services, this was a change in position for those individuals because AirServ had not provided such services. (Barry Aff. ¶ 23 & Exh. 3.) Moreover, the PAX Assist employees had no union affiliation. (Mem. Decision at 2.)

By May 23, 2016, PrimeFlight had hired approximately 362 employees, of whom 189 were hired from AirServ. (Barry Aff. ¶ 26, Exh. 2, 3.) As of May 23, 2016, PrimeFlight had not yet realized its business planning goal of increasing its employee complement to at least 500 workers.

PrimeFlight conducted additional hiring in late May and early June to accommodate the demand for Wheelchair Services. Prior to May 23, 2016, PrimeFlight employed about 106 Wheelchair Services Staff, and in June and early July 2016, PrimeFlight hired 139 additional Wheelchair Services Staff. (Barry Exhibit 1; Affidavit of Frank Birchfield ¶ 3.)

As noted above, PrimeFlight's continued hiring through July 2016 steadily reduced the percentage of former AirServ employees in PrimeFlight's workforce by bringing new individuals into the total complement of employees. Not only did the ratio of individuals previously employed by AirServ decrease, but the ratio of PrimeFlight employees performing wheelchair assistance services increased. PrimeFlight continued hiring in June 2016, increasing the size of its workforce serving JetBlue by another 60 employees. Nearly all jobs filled in this third phase of hiring were in the Wheelchair Services classification. Upon completing the third phase of hiring in July 2016, the percentage of predecessor employees from AirServ dropped to 39.4% of PrimeFlight's workforce. (Barry Aff. ¶ 28.) By July 6, 2016, approximately 245, or nearly 50%, of PrimeFlight employees working

for JetBlue were in Wheelchair Services. (Barry Aff. ¶¶ 23, 24 and Exh. 1.)

E. The Union's Demand for Recognition of a Wall-to-Wall Unit, Including Wheelchair Services Not Previously Represented

On May 23, 2016, the Union sent a letter to PrimeFlight asserting that PrimeFlight was "the successor employer" to AirServ for two units represented by the Union and demanding, among other things, that PrimeFlight recognize it as the exclusive collective bargaining agent for "PrimeFlight's employees at JFK Airport, the majority of whom were formerly Air Serv employees represented by Local 32BJ." (Exhibit J to Petitioner's Memorandum of Points and Authorities in Support of Petition (hereafter, "Exhibit J").) The Union explained:

> As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA.

(Exhibit J.)

Prior to the Union's May 23, 2016, letter, PrimeFlight was unaware that AirServ employees had been represented by a union and was unaware of any prior bargaining between the Union and AirServ.

(Exhibit F to Petitioner's Memorandum of Points and Authorities in Support of Petition at 2.) PrimeFlight responded to the Union on May 25, 2016, requesting it provide evidence establishing it represented the former AirServ employees, including any collective bargaining agreements. (Exhibit K to Petitioner's Memorandum of Points and Authorities in Support of Petition.)

By letter dated June 2, 2016, the Union provided PrimeFlight a copy of a fourteen month old recognition agreement between AirServ Corporation and SEIU Local 32BJ, dated March 26, 2015. (Exhibit L to Petitioner's Memorandum of Points and Authorities in Support of Petition.) PrimeFlight had not previously seen the recognition agreement and had never been advised by JetBlue or AirServ that such an agreement was in place. (Exhibit F to Petitioner's Memorandum of Points and Authorities in Support of Petition at 2.) PrimeFlight responded on June 10, 2016, asking if there were any additional agreements between the parties that preceded the recognition agreement and "stipulated the card check procedure referenced in the Recognition Agreement." PrimeFlight also reiterated its inquiry whether a collective bargaining agreement existed. (Exhibit J to

Petitioner's Memorandum of Points and Authorities in Support of Petition (hereafter, "Exhibit J").) The Union replied on June 15, 2016, objecting to providing any information about the recognition agreement and stating that it had supplied "sufficient documentation" demonstrating it represented "the bargaining units at JFK and Newark airport[s] in which the former Air Serv employees constitute a majority of PrimeFlight's non-supervisory workforce."[4] (Exhibit N to Petitioner's Memorandum of Points and Authorities in Support of Petition.) The Union continued: "After you acknowledge that the Union is the exclusive bargaining agent, we will be happy to provide any additional information which is necessary and relevant to collective bargaining." (*Id.*) The Union's letter closed noting its contention that "the recognition agreement cannot be legally challenged since it was entered into more than six months ago." (*Id.*)

SUMMARY OF THE ARGUMENT

PrimeFlight was sandbagged. It was not provided any notice that AirServ, the prior company serving JetBlue, had allegedly signed a recognition agreement with a union. When it began assembling its

[4] The alleged Newark unit is not at issue in this case. (Mem. Decision & Order [Doc. 24] at 4 n.1.)

workforce, PrimeFlight did so by first hiring many of AirServ's employees who otherwise would have become unemployed. PrimeFlight was under no obligation to do so and could have hired its employees in a different sequence or hired other employees altogether. Only after PrimeFlight hired approximately 189 of AirServ's former employees – but before PrimeFlight had completed its full hiring – the Union appeared, disclosed the existence of the alleged recognition agreement, claimed it represented a majority of PrimeFlight's newly hired employees, and demanded that PrimeFlight recognize it and bargain with it. PrimeFlight declined for a variety of good faith reasons. First, by PrimeFlight's count after completing its necessary hiring, over 60% of its workforce consisted of employees who were never employed by AirServ and never previously part of the group allegedly represented by the Union. Second, PrimeFlight operates in an industry in which the NLRB and the National Mediation Board ("NMB") have long determined that companies like it providing services to airline carriers are excluded from the NLRA's coverage and subject instead to the Railway Labor Act ("RLA").

PrimeFlight elected to have the issue of any bargaining obligation and the jurisdictional issue resolved through the processes of the NLRB and NMB. The status quo during the pendency of the administrative proceeding was not threatened. The district court's preliminary injunction ordering PrimeFlight to grant recognition to the union and immediately commence good faith bargaining with it does not maintain that status quo but rather alters it, granting the Union a premature victory on the merits of its claims pending before the NLRB.

The district court's Section 10(j) injunction is improper and should be vacated to allow the NLRB's proceedings to run their course. There is substantial reason to believe those proceedings will result in a decision that PrimeFlight is covered by the RLA rather than the NLRA or, alternatively, that PrimeFlight is not a successor employer under the NLRA.

ARGUMENT

I. Standard of Review

Section 10(j) of the NLRA allows the Regional Director to petition a district court "for appropriate temporary relief or restraining order" pending the Board's final adjudication of an unfair labor practice charge. 29 U.S.C. § 160(j). A district court may issue a Section 10(j)

injunction only "[i]f the court has reasonable cause to believe that an unfair labor practice has occurred and that injunctive relief would be just and proper." *Hoffman v. Polycast Tech. Div. of Uniroyal Tech. Corp.*, 79 F.3d 331, 333 (2d Cir. 1996) (citation omitted).

On appeal, this Court is "bound by the factual findings of the district court unless these are clearly erroneous." *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980). The Regional Director is given the "benefit of the doubt" regarding disputed fact issues. *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 36–37 (2d Cir. 1975). However, "[a] finding [of fact] is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)

This Court "may fully review [a district court's] conclusions of law, including findings of reasonable cause." *Mego Corp.*, 633 F.2d at 1030. This Court has "made it clear that the district court's determination that there is reasonable cause to believe an unfair labor practice has been committed is a question of law subject to full appellate review."

Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U., 494 F.2d 1230, 1244 (2d Cir. 1974). When a district court "is convinced that the General Counsel's legal position is wrong . . . it should not issue an injunction." *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U.*, 494 F.2d 1230, 1245 (2d Cir. 1974) (interpreting the "reasonable cause to believe" standard in the context of NLRA Section 10(l)).

"[I]njunctive relief under § 10(j) is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo." *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 142 (2d Cir. 2013) (citation omitted). A district court's decision that "injunctive relief is just and proper" is reviewed for abuse of discretion. *Mego Corp.*, 633 F.2d at 1030.

II. The district court lacked reasonable cause to believe that an unfair labor practice has occurred.

As the Third Circuit has observed, "the 'reasonable cause' analysis is not [a] deferential rubber stamp." *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 98 (3d Cir. 2011). To meet the reasonable cause prong of the test for a Section 10(j) injunction, "there must [first] be a substantial, non-frivolous, legal theory, implicit or explicit, in the Board's argument,

and second, taking the facts favorably to the Board, there must be sufficient evidence to support that theory." *Id.* (citations omitted). The Regional Director ultimately must show there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Mego Corp.*, 633 F.2d at 1033.

Here, the Regional Director failed to meet this standard. As set forth below, there are substantial doubts that a court of appeals would enforce a Board decision finding that PrimeFlight is covered by the NLRA under the NMB's recently narrowed standards for asserting RLA jurisdiction or that, if covered by the NLRA, PrimeFlight is a successor to AirServ based on the timing of the Union's request for recognition and the substantial changes in the composition of the alleged bargaining unit. In coming to a contrary conclusion, the district court improperly deferred to the Regional Director and ignored uncontroverted evidence.

A. The NLRB lacks jurisdiction over PrimeFlight's operations, which are covered by the RLA.

As an initial matter, there can be no unfair labor practice under the NLRA because PrimeFlight is not covered by that statute. The NLRA excludes employers and employees covered by the RLA. *See* 29

U.S.C. § 151(2), (3); 45 U.S.C. §§ 151-188. The RLA "creates a special scheme to govern the labor relations of railroads and airlines because of their unique role in serving the traveling and shipping public in interstate commerce." *Verrett v. SABRE Grp., Inc.*, 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999). The RLA is intended "to avoid any interruption to commerce" arising from labor disputes. 45 U.S.C. § 151a. "To serve each of these goals, the [National Mediation Board ("NMB")] investigates and resolves disputes arising among a carrier's employees as to who represents such employees in labor negotiations." *Union of Indus. v. Nat'l Mediation Bd.*, 139 F. Supp. 2d 557, 560 (S.D.N.Y. 2001) (citation omitted).

The RLA's definition of covered "carriers" includes companies – like PrimeFlight – that perform related services. The statute states:

> The term "carrier" includes . . . ***any company which is directly or indirectly owned or controlled by or under common control with any carrier*** by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad,

45 U.S.C. § 151, First (emphasis added). This definition has been "extended to and shall cover every common carrier by air." 45 U.S.C. §

181; *see also Union of Indus.*, 139 F. Supp. 2d at 561 ("Reading Sections 151, 181, and 182 [of the RLA] together, they establish that the definition of 'carrier' applies fully to air carriers.").

In determining whether an employer that provides services to an air carrier is subject to the RLA, the NMB applies a two part test. "First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers." *Bradley Pac. Aviation, Inc.*, 34 NMB 119, 130 (2007). "Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers." *Id.* "Both parts of the test must be satisfied for the NMB to assert jurisdiction." *Id.*; *see also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200. 212 (2006).

1. The district court erroneously deferred to the Board, which has not yet made a decision.

As an initial matter, the district court abused its discretion by finding "the NLRB's decision to assert jurisdiction over this case is subject to deference." (Mem. Decision at 6 (referring to *Chevron U.S.A.*

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).)[5] At this juncture, the NLRB has not yet finally decided whether it has jurisdiction: that disputed question presently lies before the ALJ and, if necessary, will be submitted to the Board following the ALJ's decision. Although the Regional Director has ***alleged*** PrimeFlight is an employer subject to the NLRA (Compl. ¶ 2(c)), PrimeFlight has denied that allegation (Answer ¶ 2(c)). The ALJ or the Board on appeal may yet reject the Regional Director's allegation based on the evidence that was adduced during the ALJ hearing and based on the parties' briefing. *See, e.g.*, *U.S. Postal Serv.*, 200 NLRB 413, 414 (1972) (rejecting General Counsel's jurisdictional argument and finding Board lacked jurisdiction over incident alleged in Complaint). Because the Board has not yet decided whether PrimeFlight is an "employer" under the NLRA, there

[5] *Chevron* deference applies to an agency's construction of the statute it administers "if the statute is silent or ambiguous with respect to the specific issue." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 843). In the face of such ambiguity or silence, the agency's construction will be upheld if it is "permissible." *Id.* Specifically concerning the NLRA, the Supreme Court has also held that "[s]ince the task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,' the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). These two forms of deference appear to be essentially the same.

was no final Board decision on that issue to which the district court could defer.

Moreover, the Board would not be entitled to *Chevron* deference in its interpretation and application of a statute other than the NLRA, such as the RLA. *See United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1226 (D.C. Cir. 1996) ("As the scope of the NLRB's jurisdiction thus depends on an interpretation of the RLA, which the NLRB does not administer, we cannot simply assume that the NLRB should receive *Chevron* deference in this case . . . ."). Courts generally review *de novo* the Board's interpretation of law outside the NLRA, including other federal statutes. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) (not deferring to the Board's interpretation of the Bankruptcy Code).[6]

Here, to the extent the district court relied on *Chevron* deference to find the Board has jurisdiction, that finding was based on a misapplication of the law and was an abuse of discretion.

[6] Some cases suggest the NLRB receives at least "some deference on difficult questions of labor law" when interpreting other federal labor statutes such as the FLSA. *UPS*, 92 F.3d at 1226-27 (discussing cases).

2. The district court erroneously relied on recent NMB decisions that changed the law without a reasoned explanation.

In finding PrimeFlight is covered by the NLRA, the district court also erred by deferring to several recent NMB decisions that represent a change in NMB policy without reasoned explanation. (Mem. Decision at 7-8.) In determining the degree of deference owed, courts "consider the consistency with which an agency interpretation has been applied." *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 124 n.20 (1987). In a recent decision striking down a new Department of Labor regulation, the Supreme Court ruled:

> In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (internal citations omitted). *See also NLRB v. Bell Aerospace Co. Div. of*

Textron, 416 U.S. 267, 289 (1974) (rejecting Board's new interpretation of the NLRA).

Here, the district court recognized the NMB has recently changed its position on jurisdiction. "It appears to the Court . . . that the NMB has, since 2013, ceded jurisdiction over certain airline contractors to the NLRB." (Mem. Decision at 8.) Similarly, Board Member Johnson has recently noted:

> [I]n three recent cases, the National Mediation Board ("NMB") has issued advisory opinions to the NLRB declining jurisdiction, despite air carriers providing detailed specifications as to the employer's performance of work traditionally performed by carriers (and their auditing that performance). *See Menzies Aviation, Inc.*, 42 NMB 1, 2, 4-5 (2014) (Member Geale dissenting); *Airway Cleaners*, 41 NMB 262, 267-269 (2014) (Chairman Hoglander concurring, but applying a different rationale; Member Geale dissenting in relevant part); *Bags, Inc.*, 40 NMB 165, 169 (2013). Whether or not Member Johnson would agree with this view were he on the NMB, ***he acknowledges that these cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds,*** and that this view is currently extant NMB law.

PrimeFlight Aviation Servs., Inc., 12-RC-113687, 2015 WL 3814049, at *1 n.1 (NLRB June 18, 2015) (emphasis added).

Significantly, the NMB's recent shift (and, derivatively, the NLRB's) from acknowledging jurisdiction under the RLA over

contractors in airline carrier cases to now declining such jurisdiction despite the existence of "similar grounds" represents an important policy change with significant practical implications. The NMB adopted its current two-part test for coverage of airline contractors in the early 1980s. *See* Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 ABA J. Lab. & Emp. L. 77, 91 (2015).[7] At the time, the NMB explained it had "undertaken an extensive evaluation of its jurisdictional standards" and that "[r]ecent jurisdictional determinations of this Board have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." *Bhd. Ry. Carmen*, 8 NMB 58, 61 (Oct. 15, 1980).

Under the two-part test, the NMB has regularly asserted jurisdiction. From the late 1990s through 2011, the NMB found "RLA jurisdiction in all but one of over thirty airline-control cases." Garren, *supra*, at 93 & n. 133 (collecting citations); *see also John Menzies, Plc d/b/a Ogden Servs., Inc.*, 31 NMB 490, 506 (Aug. 26, 2004) (citing

[7] Mr. Garren, who is the Deputy General Counsel for the Union, appeared and filed an amicus brief in the district court. *See* Br. of SEIU Local 32BJ as Amicus Curiae [Doc. 18]. Unsurprisingly given his position, Mr. Garren in his article supports the NMB's recent narrowing of its assertion of jurisdiction over airline contractors.

numerous decisions in which the NMB "has found that the airline service companies fall within the RLA's jurisdiction because a carrier or carriers exercise significant control over the airline service companies' operation at a particular airport"). The NMB observed this increase resulted in part from changes in airline operations. In particular, the NMB explained that "since September 11, 2001, there have been significant changes in airport operations due to security and safety concerns," and "[t]hese changes have resulted in greater control exercised by air carriers over airline service companies." *Menzies*, 31 NMB at 506.

The NMB abruptly diverged from this nearly three-decade course beginning in 2012. "Between 2012 and 2014, the NMB found no RLA jurisdiction over [airline contractors] in six cases." Garren, *supra*, at 100 & n. 189 (collecting cases). The NMB now declines RLA jurisdiction in all cases in which a contractor has only an allegedly "typical subcontracting relationship" with an air carrier. *See e.g.*, *Airway Cleaners, LLC*, 41 NMB 262, 268 (Sept. 11, 2014) (stating a "carrier must exercise 'meaningful control over personnel decisions,'" and not exercise only "the type of control found in any contract for services" to

establish RLA jurisdiction"); *see also* Garren, *supra*, at 103 ("[T]he *Airway Cleaners* test—that a "typical" [airline contractor] is exempt from RLA jurisdiction—***seems inconsistent with more than thirty decisions from 1996-2011 that found RLA jurisdiction over [airline contractors]***" (emphasis added)).

The NMB has not provided any reasoned explanation for its dramatically shifting its policy and effectively narrowing RLA jurisdiction. Under the principles established by *Encino Motorcars*, the NMB's and NLRB's unexplained reversal in their prior, well-established law are not entitled to deference. Indeed, neither NBM or the NLRB demonstrate any cognizance that their longstanding policies may have "engendered serious reliance interests that must be taken into account." *See, e.g., Encino Motorcars*, 136 S.Ct. at 2126 (holding "because of decades of industry reliance on the [DOL's] prior policy" DOL's "explanation [for reversing its prior position in a regulation] fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position"). Accordingly, "[t]his lack of reasoned explication for a regulation that is inconsistent with the [NMB's] longstanding earlier position results in a rule that cannot carry the force of law," and "[i]t

follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute." *Id.* at 2127. The district court, by deferring to the NMB's new decisions that fail to explain why the NMB has changed its position, was an abuse of discretion. (Mem. Decision at 7-8.)

3. The district court erroneously applied the NMB's new standards.

In purporting to apply the NMB's two-part test, the district court stated that whether a company is subject to the RLA as a "derivative carrier" depends on:

> (1) whether the functions performed by the potential derivative carrier's employees are among those traditionally performed by carrier employees, and (2) whether the potential derivative carrier's labor relations are subject to significant control by the carrier.

(Mem. Decision at 6 (citations omitted).)

The district court correctly found that the answer to the first part of this test is "certainly yes." (Mem. Decision at 9.) PrimeFlight's employees perform work that is traditionally performed by employees in the airline industry. Skycap services, including curbside baggage check-in, baggage claim area monitoring, handling and assistance, and wheelchair and passenger assistance are activities that have regularly

been found to be work traditionally performed by employees of an air carrier. *See Command Sec. Corp.*, 27 NMB 581, 584 (2000); *VGR Int'l Bus.*, 27 NMB 232, 235 (2000); *Quality Aircraft Services*, 24 NBM 286, 287 (1997).

However, the district court's conclusion that PrimeFlight did not satisfy the second part of the test – the "control" prong – applied the wrong legal standard and was clearly erroneous. In rejecting PrimeFlight's evidence and authorities concerning direct and indirect carrier control over PrimeFlight's operations at JFK, the district court relied heavily on a single, recent NMB decision, *Bags, Inc.* 40 NMB 165 (2013). (Mem. Decision at 10-13.) That reliance was improper for multiple reasons.

First, as set out above, the NMB in *Bags* and other recent decisions has changed its jurisdictional policy without explaining it or even acknowledging that dramatic change. Those recent NMB decisions inexplicably applying a new, narrower standard are therefore not entitled to deference. (*See supra* at 32-37.) Nevertheless, the district court, apparently following *Bags* and other recent NMB decisions, at one point described the NMB's control test as now asking narrowly

"whether the potential derivative carrier's ***labor relations*** are subject to significant control by the carrier." (Mem. Decision at 6 (emphasis added.) But that is not the standard applied in the judicial precedent cited by the district court, nor is it the standard stated in the NMB's own decisions. Those authorities ask more generally "whether the . . . employer was under the ownership or control of an air carrier." *Cunningham v. Elec. Data Sys. Corp.*, 579 F. Supp. 2d 538, 541 (S.D.N.Y. 2008); *see also Union of Indus.*, 139 F. Supp. 2d 561 (the NMB control test asks "whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers").[8]

It is well established the control factor focuses on the role that a carrier plays in the contractor's daily operations and on the manner in which the employees perform their jobs. *See, e.g., Quality Aircraft Servs.,* 24 NMB 286, 291 (1997). The factors to be considered include:

- Control over the manner in which the entity conducts its business, including access to the employer's operations and records;
- Involvement in hiring, firing and disciplinary decisions;

[8] The district court elsewhere stated the test asks "does JetBlue exercise substantial control over PrimeFlight," which the court described as the "substantial control factor." (*See* Mem. Decision at 9.)

- Supervision and direction of the entity's employees in the performance of their job duties;
- Influence over the conditions of employment;
- Influence over employee training; and
- Control over uniform and appearance requirements.

See, e.g., Automobile Distr. of Buffalo Inc. and Complete Auto Network, 37 NMB 372, 378 (2010). The NMB has not stated whether any one factor is more probative than the others and has found that not all of the factors must be present to meet the control test. (*See* Mem. Decision at 9.)

Notably, in *Bags, Inc.* the NMB unconvincingly distinguished its own earlier ruling involving ***PrimeFlight's*** operations a few miles away at LaGuardia airport. *See PrimeFlight Aviation Services, Inc.*, 34 NMB No. 33; 2007 NMB LEXIS 26 (June 21, 2007). In its prior PrimeFlight decision applying its prior longstanding view of RLA jurisdiction, the NMB found sufficient carrier control for such jurisdiction based on the following:

- Carriers require PrimeFlight to maintain records of employees who have successfully completed the Carrier-mandated training.
- Carriers have access to PrimeFlight's employee training records.

- Carrier representatives train and designate PrimeFlight employees as Carrier trainers who, in turn, train other PrimeFlight employees.
- Carriers' schedules dictate the staffing levels and shift assignments of PrimeFlight employees.
- Carrier officials make changes in daily assignments regularly.
- Although PrimeFlight hires its own employees and sets their wages and benefits, the Carriers report problems with PrimeFlight's employees.
- PrimeFlight has complied with the Carrier's request to reassign a PrimeFlight employee.
- PrimeFlight's baggage service agents and priority parcel service employees wear Carrier uniforms.
- The rest of PrimeFlight's employees wear PrimeFlight uniforms approved by the Carriers.

(Id. at *12-15.)

The evidence presented in this case demonstrates PrimeFlight's operations at JFK are substantially similar to those that satisfied the carrier control test at LaGuardia. In this regard, JetBlue similarly:

(1) is contractually authorized to inspect and audit PrimeFlight's "books, records, and manuals… at all times."

(2) interacts frequently and continuously with and directs the work of PrimeFlight's employees;

(3) makes radio calls to PrimeFlight employees who must answer the calls in order to receive instructions about providing passenger services;

(4) exercises broad, constant influence over all workplace conditions for PrimeFlight employees, including setting PrimeFlight employee shifts, schedules, and hours, as well as staffing levels;

(5) provides PrimeFlight space and equipment including locker rooms and break rooms, wheelchairs, radios, and telephones, baggage carts, computers and technology platform;

(6) affords the wheelchairs used to transport passengers, the radios and telephones with which PrimeFlight employees communicate, the baggage carts they use to transport baggage, and the computers and technology platform they use to accomplish and record their tasks;

(7) instructs PrimeFlight to provide its employees with all necessary initial and recurrent training to perform JetBlue passenger services;

(8) requires PrimeFlight employees to regularly attend employee meetings conducted by JetBlue, as well as JetBlue meetings relating to safety, new programs, special events, and coordination of services;

(9) approves the uniforms PrimeFlight employees are permitted to wear.

(*See supra* at 8-17.)

Despite the NMB's own prior decision in materially similar circumstances in *PrimeFlight*, the district court, relying instead on the NMB's newly narrowed view of RLA jurisdiction as exemplified in *Bags, Inc.*, found the above evidence of carrier control insufficient to establish RLA jurisdiction. First, with respect to the fact that JetBlue provides all of the space and equipment PrimeFlight uses at JFK, the district court

reasoned that "in *Bags*, the company either leased space or was given space by the airlines it served, and the NMB found this factor materially insufficient." The district court failed to afford any weight to the fact that JetBlue provided PrimeFlight all of the space and equipment at JFK, which was not true of the carriers in *Bags,* stating "[t]here is no significant difference between providing a substantial amount of equipment and all of the equipment." (Mem. Decision at 12.) JetBlue provided PrimeFlight with the wheelchairs used to transport passengers, the radios and telephones with which employees communicate, the baggage carts they use to transport baggage, and the computers and technology platform they use to accomplish and record their tasks. (*Supra* at 15.)

Second, regarding the evidence that JetBlue exercises broad, constant influence over all workplace conditions for PrimeFlight employees, including setting PrimeFlight employee shifts, schedules, and hours, as well as staffing levels, the district court focused merely on staffing levels concluding that "Bags and Delta had daily conference calls to discuss staffing, and this was insufficient for NMB jurisdiction." (Mem. Decision at 10.) The district court's conclusions regarding the

extent and scope of JetBlue control are contradicted by the undisputed evidence and inconsistent with the NMB's longstanding case law.

Most remarkably, the district court's ultimate conclusion that JetBlue does not exercise sufficient control over PrimeFlight is inconsistent with the limitations that the district court included in its own injunction order and with the court's stated reasons for those limitations. In issuing the preliminary injunction mandating that PrimeFlight bargain with the Union, the district court carved out an exception, ordering that "[a]ny agreement reached between [PrimeFlight] and the Union may not include minimum shift or employee requirements so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs." (Prelim. Inj. ¶ 2(b).)

The Regional Director moved the district court to amend the preliminary injunction to remove the above exception. (*See* Motion to Amend [Docs. 29 & 29-1].) The Regional Director argued that "shifts and staffing" are "inextricably interwoven with other terms and conditions of employment." (Doc. 29-1 at 7.) He reasoned that

"Paragraph 2(b) [of the preliminary injunction] . . . makes meaningful bargaining on any topic impossible." (*Id.* at 8.)

The district court denied the Motion to Amend and explained in relevant part:

> The NLRB's main complaint with the staffing provision seems to be that it "forces the Union to concede to Respondent the sole discretion to determine shifts and staffing levels, which are vital terms and conditions of employment that must be determined through the collective bargaining process." This statement is incorrect: ***Both the Order and Preliminary Injunction explicitly cede discretion for staffing determinations to JetBlue.*** See Memorandum Decision and Order ("PrimeFlight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs"); Preliminary Injunction (the limitation is "so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs"). ***As a practical matter, it is reasonable to give JetBlue the authority to determine its own staffing needs given that it is JetBlue that is running its airline.***
>
> The NLRB refuses to acknowledge that JetBlue's needs determine staffing levels, instead arguing that the Union should be able to bargain about staffing needs. ***The NLRB is effectively arguing that JetBlue should not have authority to determine its own staffing requirements and that the Union has better information about JetBlue's needs than JetBlue itself. This argument fails. The staffing limitation appropriately gives staffing authority to JetBlue, which in turn provides that information to PrimeFlight.*** The Union has no basis to determine staffing levels.

(Mem. Decision and Order of Dec. 13, 2016 [Doc. 34]) at 4-5 (emphasis added.)

Accordingly, the district court found that JetBlue exercises substantial control over PrimeFlight's shifts and staffing, which the Regional Director concedes are issues "inextricably interwoven" with PrimeFlight employees' other terms and conditions of employment. (Doc. 29-1 at 7.) In light of these findings and concessions, the district court should have concluded the "control" test was satisfied as a whole.

Third, the district court also found unpersuasive that JetBlue's supervisors frequently and continuously interact with and direct the work of PrimeFlight's employees on a daily basis. (*See supra* at 12-13.) Once again, the district court relied on NMB's decision in *Bags, Inc.* where Bags:

> had daily conference calls with Delta managers to discuss wheelchair complaints and any other daily issues, including inadequate staffing, and Bags was to use "best efforts to follow any instructions provided by Delta's designated management representatives… regarding the standards, procedures, and practices to be followed."

(Mem. Decision at 11 (citing *Bags, Inc.,* 40 NMB at 167)). But the district court's attempt to equate the interaction between JetBlue ***supervisors*** and PrimeFlight ***employees*** with that between Delta

managers and Bags ***managers*** ignored a fundamental fact: JetBlue supervisors ***directly*** interact with PrimeFlight employees, and such direct interaction was apparently lacking in *Bags, Inc.*

In addition, the district court unreasonably and arbitrarily ignored the fact that PrimeFlight only began operating at JFK very shortly before this matter was filed. In these circumstances, it is unreasonable to expect PrimeFlight would be able to provide evidence of specific instances in which JetBlue has affirmatively exercised every aspect of the control it possesses over PrimeFlight under the parties' agreements. Not enough time had passed for specific incidents to arise, and, in these circumstances, special attention should be directed to the terms of the contract. The scope and amount of control that JetBlue is permitted to exercise over PrimeFlight as set forth in the parties' agreements is consistent with the control exercised at LaGuardia where the NMB already found RLA jurisdiction.[9]

The district court abused its discretion by relying on and deferring to new NMB authority that diverts from decades of NMB precedent, by

[9] In a factually similar case, the RLA jurisdiction issue was orally argued to the D.C. Court of Appeals on November 21, 2016 and is awaiting the first appellate court opinion on the issue. *NLRB v. ABM Onsite Services – West, Inc., appeal docketed*, No. 15-1347 (D.C. Cir. Oct. 8, 2015).

rendering a legal conclusion at odds with its own findings, and by disregarding prior applicable precedent, including the NMB's own prior decisions finding PrimeFlight covered by the RLA in materially identical circumstances.

B. There is no reasonable cause to believe PrimeFlight is a successor employer.

Even if the district court had reasonable cause to believe PrimeFlight is subject to the NLRA (which it did not), there is no reasonable cause to believe PrimeFlight is a successor employer to AirServ. To the contrary, under the well-recognized principles of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and its progeny, PrimeFlight has no obligation to recognize or bargain with the Union because there was never a majority of its employees who, in a "substantial and representative compliment," worked for the prior unionized employer, AirServ.

To establish successorship status, a majority of employees in a successor employer's bargaining unit must have been employed by the predecessor. The timing of that calculation is appropriate when a substantial and representative complement exists. See *Fall River*

Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 28 (1987). In making that determination, a court considers:

- whether the job classifications designated for the operation were filled or substantially filled;
- whether the operation was in normal or substantially normal production;
- the size of the complement on that date and the time expected to elapse
- before a substantially larger complement would be at work; and
- **the relative certainty of the employer's expected expansion.**

Id. at 48-49 (emphasis added). The Board has held that it is appropriate to delay the bargaining obligation determination where the new employer expects with reasonable certainty to substantially increase its employee complement within a relatively short period of time. *Myers Custom Products,* 278 NLRB 636 (1986).

As a threshold factual matter, the Wheelchair Services employees, a classification not represented by the Union at AirServ, are a critical part of the proposed bargaining unit. Key to evaluating PrimeFlight's proper complement of employees is the fact that PrimeFlight did not reach that complement until it had added the new classification of

Wheelchair Services to the prior operation and hired hundreds of previously unrepresented employees into that classification.

PrimeFlight consolidated the wheelchair attendant services, which had previously been performed by PAX Assist, a non-union employer, with baggage personnel and line monitoring services previously provided by AirServ. In so doing, PrimeFlight substantially altered the nature and size of the alleged AirServ bargaining unit. Moreover, before receiving a recognition demand from the Union, PrimeFlight had already begun planning a major increase in the number of Wheelchair Services Staff. Upon beginning operations on May 9, PrimeFlight determined that it needed far more wheelchair attendants than the 111 it had hired in April.

In light of PrimeFlight's hiring plans, partial and full employee complements can be identified as follows:

- At the time of the Union's request for recognition on May 23, 2016, there were approximately 361 employees hired by PrimeFlight with approximately 189 hired from AirServ. As of May 23, 2016, however, PrimeFlight had not realized its business planning goal of increasing its employee complement to

at least 500 workers. Prior to that date, PrimeFlight had only about 106 Wheelchair Services Staff.

- Heavy hiring commenced in late May and early June. In a matter of four weeks following PrimeFlight's initiation of operations at JFK, by June 16, 2016, the size of the employee complement increased substantially from 361 to 440. The number of predecessor employees increased by only eight employees, to 197 total, and the percentage of predecessor employees from AirServ was not a majority of the workforce as of June 16, 2016.
- By early July 2016, PrimeFlight had hired a total of 139 additional Wheelchair Services Staff as part of its original business plan to increase those services. At that point, PrimeFlight had reached its business planning goal from early May 2016 of reaching at least 500 total employees at JFK. The number of predecessor employees remained at 197.

(*See supra* at 8-7, 18-20.)

At the time the Union demanded recognition on May 23, 2016, the undisputed facts show that PrimeFlight intended to expand its workforce

substantially. The Regional Director did not offer any evidence to counter PrimeFlight's evidence that it planned to continue expanding its workforce.[10] The appropriate date on which to calculate whether the Union enjoyed majority support of PrimeFlight's employees was July 6, 2016, when PrimeFlight reached its staffing goals. By the time it completed its hiring, a substantial number of PrimeFlight employees (approximately 50%) are performing ***work not previously performed by AirServ.*** Merging the larger wheelchair assistants' classification into the previous unit recognized by AirServ defeats any suggestion the unit continued to be appropriate. *See, e.g., Border Steel Rolling Mills*, 204 NLRB 814 (1973). Moreover, by July 6, 2016, AirServ employees were far below the majority of PrimeFlight's workforce.

The district court's conclusion that PrimeFlight's workforce as of May 9, 2016, or May 23, 2016, was a "substantial and representative complement" of its ultimate workforce is contrary to the facts and unreasonable. The workforce as it existed on May 9 or May 23 lacked the scores of Wheelchair Services Staff who were hired over the following weeks. By the time its hiring was complete, PrimeFlight's

[10] The Regional Director certainly did not, and could not, point to any evidence that PrimeFlight ever intended to employ only the 361 employees it had hired as of May 23 when the union demanded recognition.

staff consisted of a majority of Wheelchair Services Staff, ***a job that did not even exist at AirServ***. PrimeFlight's ultimate workforce therefore looks substantially different, not only from AirServ's workforce but from PrimeFlight's own workforce as it existed on May 9 and 23. The district court abused its discretion in finding otherwise.

III. Injunctive relief is not "just and proper" under the circumstances.

The district court also erred in finding that its preliminary injunction is "just and proper" because it is allegedly "necessary to prevent irreparable harm or to preserve the status quo." (Mem. Decision at 20.) The just and proper standard calls upon courts to focus on the "public interest, and 'the unusual likelihood . . . of ultimate remedial failure' by the NLRB." *Chester*, 666 F.3d at 98 (quoting *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998)). Courts must look to "whether the ongoing practices would create 'irreparable' harms, i.e., injuries that could not be remediated by the Board's final decision." *Chester*, 666 F.3d at 98. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Supreme Court stated "[t]he Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Id.* at 312

(citation omitted). In the context of Section 10(j) relief, the courts have long held that "the appropriateness and scope of an injunction . . . . may be measured by the need to maintain the status quo, to preserve the jurisdiction of the NLRB, and to foster the purposes of the federal labor laws." *Mack v. Air Exp. Int'l*, 471 F. Supp. 1119, 1124 (N.D. Ga. 1979).

It is well established that the status quo that must be preserved or restored is that which "existed before the onset of unfair labor practices." *Seeler*, 517 F.2d at 38.

> As to irreparable harm, district courts consider "whether the employees' collective bargaining rights may be undermined by the ... [alleged] unfair labor practices and whether any further delay may impair or undermine such bargaining in the future." The "main focus of a section 10(j) analysis should be on harm to organizational efforts."

Paulsen v. CSC Holdings, LLC, No. CV 15-7054, 2016 WL 951535, at *11 (E.D.N.Y. Mar. 8, 2016), appeal withdrawn (Sept. 1, 2016)

When the Board has sought injunctive relief to require initial recognition and bargaining pending adjudication of a complaint, the courts have considered the specific facts of each case. In *Boire v. Pilot Freight Carriers*, for example, the employer refused to recognize the union on the basis of a card majority. Thereafter, the employer allegedly initiated a vigorous unlawful campaign against the union. Although the

district court found that "reasonable cause" had been shown, it refused to issue a Section 10(j) bargaining order, and the Fifth Circuit affirmed. The appellate court ruled that because the union had never enjoyed a bargaining relationship with the employer, an interim bargaining order was inappropriate because it would materially alter, rather than maintain or restore, the status quo. To hold otherwise, said the court, would infringe upon "matters peculiarly within the investigatory-adjudicatory province of the Board." 515 F.2d 1185, 1194 (5th Cir. 1975).

A different result was reached by the Second Circuit in *Seeler v. Trading Port, Inc.* on different facts. There, a union, which had previously obtained authorization cards from a majority of the unit employees, allegedly lost the election because of substantial unfair labor practices committed by the employer. The district court dismissed the regional director's Section 10(j) petition. The Second Circuit reversed and remanded, disagreeing with the district court's application of the status quo criterion. Recognizing that an interim bargaining order is a "serious measure which should not be undertaken whenever a claim of unfair labor practices is made," the court ruled that there was

reasonable cause to believe that the employer's conduct was flagrantly violative of the NLRA. The district court was therefore empowered to "order immediate bargaining to prevent irrevocable harm to the union's position in the plant, to the adjudicatory machinery of the Board, and to the policy of the Act in favor of the free selection of collective bargaining representatives." 517 F.2d at 39.

Here, the district court unreasonably failed to identify what the "status quo" was at the time PrimeFlight commenced operations, failed to give adequate weight to good reasons for not granting an injunction, and failed to consider that PrimeFlight has not engaged in any conduct "flagrantly violative of the NLRA" as part of a scheme to undermine employee's organizational rights.

First, the district court ordered PrimeFlight to recognize and commence bargaining with the Union, but there is no evidence that AirServ was actively engaged in bargaining with the Union before PrimeFlight commenced operations. Although the district court concluded "support for [the Union] has declined since PrimeFlight began operations" in May 2016 (Mem. Decision at 21), the district court failed to determine the level of support for the Union immediately

before PrimeFlight commenced operations. In particular, the district court failed to consider whether the level of union support had dropped during the 14 months between March 2015 when the recognition agreement was signed and May 2016 when PrimeFlight began operations. It is far more reasonable to infer that any alleged drop in union support occurred during the Union's 14-month failure to achieve an agreement after it obtained a recognition agreement from AirServ rather than during the very short interval when PrimeFlight first replaced AirServ. Indeed, the alleged evidence offered by the Regional Director that some former AirServ employees currently lack enthusiasm for the Union only demonstrates that diminished confidence in the Union ***is the status quo*****,** not a change from it caused by PrimeFlight's refusal to bargain. *Cf. CSC Holdings, LLC*, 2016 WL 951535, at *12 (no showing that reinstatement of former employee was required under 10(j) to support organizing activity because "[t]here was only one employee other than [him who] expressed interest in the union and that employee was discouraged and thought any organizing activity should be abandoned due to lack of interest *before* [the first employee] was terminated").

Second, the district court also failed to find any "harm to [employees'] organizational efforts" would likely result without an injunction mandating recognition and bargaining. Most importantly, the district court failed to find that any alleged decline in current support for the Union poses an immediate threat to the Union's future possible representation of PrimeFlight's employees. To the contrary the possibility of future Union representation rests on a recognition agreement ***that has already been signed*** and on the NLRB's assessment of that agreement (assuming the NLRB has jurisdiction). In short, the Union's possible future representation of PrimeFlight employees does not rest in the hands of employee voters or organizers, and their current alleged feelings about the Union are therefore not dispositive. *Cf. CSC Holdings, LLC*, 2016 WL 951535, at *12 (denying petition for 10(j) injunction in part because "this [is not] a case in which the failure to reinstate will frustrate an organizing campaign that is in progress" and "any further delay in [reinstatement] will not undermine collective bargaining rights").

Third, there is no evidence PrimeFlight has engaged in any effort to undermine employee support for the Union as it awaits a decision

from the ALJ and the NLRB. PrimeFlight has only invoked its rights under the RLA and the NLRA to obtain a decision from the appropriate governmental agency regarding its obligations under Federal law. PrimeFlight should be under no obligation to recognize and bargain with the Union when that very matter is being considered by an NLRB.

CONCLUSION

In *NLRB v. Ridgewood Health Care Center, Inc.*, 154 F. Supp. 3d 1258 (N.D. Ala. 2015), the court found that a routine successorship case such as this one did not warrant 10(j) relief. The court emphasized the extraordinary nature of Section 10(j) injunctive relief:

> Section 10(j) is itself an extraordinary remedy to be used by the Board only when, in its discretion, an employer or union has committed such egregious unfair labor practices that any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated. [I]f a harm is of a routine character in the NLRA context, the parties usually can redress such wrongs under the NLRB administrative processes. [C]are must be taken [by the court] so that [§ 10(j) injunctive relief] remains an extraordinary remedy, to be requested by the Board and granted by a district court only under very limited circumstances.

Id. at 1266 (internal citations and quotation marks omitted).

Because Section 10(j) injunctive relief is an extraordinary remedy, it is only appropriate in the "unusual likelihood (compared to other

cases before the Board) of ultimate remedial failure" and is "not intended to undermine the normal processes of labor law adjudication: administrative resolution by the NLRB followed, if necessary, by enforcement in the courts of appeals." *Kobell v. Suburban Lines*, 731 F.2d 1076, 1091 n. 26 (3d Cir. 1984).

This Court has also cautioned that when Congress granted courts authority to preliminarily enjoin alleged unfair labor practices pending NLRB decisions, "it was thinking primarily of the run of the mine cases where the law was relatively plain although the facts might be in serious dispute, not of a new adventure of the General Counsel in the interpretation of a statute . . . years after it had come on the books." *Danielson*, 494 F.2d at 1245. "In such a case it is more realistic to regard the status quo as what everyone had assumed it to be until General Counsel evolved his new theory . . . ." *Id.*

Based on all of these considerations, the district court here abused its discretion by entering a Section 10(j) injunction based on novel theories from the NMB regarding the scope of its RLA jurisdiction. PrimeFlight respectfully requests the Court: 1) vacate the district court's preliminary injunction order, restoring the status quo pending

resolution of the NLRB's administrative processes and acknowledging that the NLRB has not established that PrimeFlight is subject to the NLRA or is a successor employer, 2) dismiss the Petition, and 3) award it all other just relief to which it is entitled.

Respectfully submitted,

by: s/Christopher C. Murray

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CERTIFICATE OF SERVICE

I certify that on this 9th day of February, 2017, I caused this BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE PRIMEFLIGHT AVIATIONS SERVICES, INC. to be filed electronically with the Clerk of the Court using the CM/ECF System, thereby serving all counsel.

s/Christopher C. Murray

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 11,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

Dated this 9th day of February, 2017.

s/Christopher C. Murray

SPECIAL APPENDIX

SPECIAL APPENDIX

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Orders and Opinions

Rules of Law

29 U.S.C. § 158(a)(1) & (5)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C § 160(j)

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**MEMORANDUM DECISION AND ORDER**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

Before the Court is a petition for a preliminary injunction under § 10(j) of the National Labor Relations Act ("NLRA") filed by James G. Paulsen, the Regional Director of Region 29 of the National Labor Relations Board (the "NLRB" or the "Board"). The petition seeks relief pending the determination by an Administrative Law Judge over proceedings currently underway, in which petitioner claims that respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight") has engaged and is engaging in unfair labor practices within the meaning of §§ 8(a)(1) and (5) of the NLRA. See 29 U.S.C. § 158(a)(1), (5). Petitioner seeks an injunction restraining respondent from further violations of the NLRA; directing respondent to recognize and bargain with the Service Employees International Union, Local 32BJ (the "Union" or "SEIU"), as required under § 8(a)(5); and requiring respondent to provide information relevant to the Union's collective bargaining efforts.

The Court ordered respondent to show cause why it should not grant the relief requested. Having heard oral argument on the petition and reviewed the parties' submissions, the Court

concludes that petitioner has established reasonable cause for the Court to believe that PrimeFlight has committed unfair labor practices and that injunctive relief is just and proper. The petition is therefore granted in part.

BACKGROUND

JetBlue Airways Corporation ("JetBlue") operates out of Terminal Five at John F. Kennedy Airport ("JFK") in Queens, New York. As part of its operations, JetBlue, through independent contractors, offers baggage handling, skycap, checkpoint, and wheelchair services to its customers. Prior to May 9, 2016, Air Serv, an independent contractor, performed the baggage handling, skycap, and checkpoint services for JetBlue, and PAX Assist, another independent contractor, performed the wheelchair services for JetBlue. During this period, SEIU represented Air Serv employees in collective bargaining pursuant to a March 2015 recognition agreement, whereas PAX Assist employees had no union affiliation.

Respondent PrimeFlight is an independent contractor that provides terminal services at several airports around the country. In early 2016, PrimeFlight successfully bid on a contract to provide JetBlue's terminal services at Terminal Five at JFK. PrimeFlight entered into a contract with JetBlue, under which PrimeFlight was to provide baggage handling, skycap, checkpoint, and wheelchair services. On May 9, 2016, PrimeFlight took over these services from both Air Serv and PAX Assist in Terminal Five and continues to provide all four types of terminal services to date.

In the weeks leading up to the May 9, 2016 transition date, PrimeFlight hired its workforce. To hire its workforce and ensure no gap in services between Air Serv and PAX Assist ceasing operations on May 8 and PrimeFlight beginning operation on May 9, PrimeFlight asked Air Serv to provide PrimeFlight with its lists of active Air Serv employees. PrimeFlight,

concerned with ensuring that it had enough qualified employees – *i.e.*, employees with the credentials required to pass through airport security – asked Air Serv to encourage its employees to apply for positions with PrimeFlight.

When PrimeFlight began operations on May 9, 2016, it had hired 362 employees in total. More than half of those employees were former Air Serv employees (189 of 362, or 52%). Further, on May 9, 2016, PrimeFlight had employees in all four job classifications – baggage handling: 76 employees; skycap: 35 employees; checkpoint: 64 employees; and wheelchair: 174 employees. By July 2016, PrimeFlight would ultimately employ 507 individuals in all four classifications – baggage handling: 81 employees; skycap: 35 employees; checkpoint: 67 employees; and wheelchair: 309 employees. Comparing the numbers of employees initially hired against the ultimate employment rolls, on May 9, 2016, PrimeFlight had hired at least fifty percent of the employees that it would ultimately employ in all four job classifications – baggage handling: 76 of 81, or 94%; skycap: 35 of 35, or 100%; checkpoint: 64 of 67, or 95%; and wheelchair: 174 of 309, or 56%. Overall, as of May 9, 2016, PrimeFlight had hired more than half of the employees that it would ultimately employ – 362 of 507, or 71%.

On May 23, 2016, SEIU sent a letter to PrimeFlight, demanding that PrimeFlight recognize SEIU as the representative of "PrimeFlight's employees at JFK Airport, the majority of whom were formerly Air Serv employees represented by Local 32BJ." The letter continued that "these are employees working at Terminal Five on the Jet Blue account" and are "providing baggage handling, skycap and check point services;" SEIU's letter stated that it understood that "the appropriate bargaining unit also includes employees providing wheelchair assistance." SEIU requested "recognition for a unit of all full-time and regular part-time employees at Terminal Five on the Jet Blue account, excluding supervisors, office clericals, and guards as

defined in the NLRA."[1] In addition, SEIU requested certain information from PrimeFlight, including a roster of all bargaining unit employees, applicable employee handbooks, and plan descriptions for health insurance and employee benefits.

On May 25, 2016, PrimeFlight replied to SEIU, requesting evidence that established the basis for SEIU's claim that it represented the employees at issue, including Board certifications and collective bargaining agreements. On June 2, 2016, SEIU replied to PrimeFlight, enclosing a copy of its March 2015 recognition agreement with Air Serv. PrimeFlight replied again on June 10, 2016, seeking any additional agreements between the parties or any collective bargaining agreements for any of its employees. On June 15, 2016, the Union replied to PrimeFlight, stating that it had already provided sufficient information and that it would provide additional material once PrimeFlight recognized the Union. There was no further correspondence between the Union and PrimeFlight after this letter.

On May 26, 2016, three days after SEIU's May 23, 2016 request for recognition, PrimeFlight began to hire additional employees. PrimeFlight completed all of its hiring on July 6, 2016, having hired 507 employees in total. As a result of this hiring, former Air Serv employees comprised 39.4% of the total hired. In its submissions to the Court, PrimeFlight stated that on taking over on May 9, 2016, it determined that it needed 500 employees and that it intended to hire more employees in two phases: one in mid-to-late June and one in July.

In July, the NLRB filed an administrative complaint under the NLRA against PrimeFlight, and the administrative hearing related to that charge is currently underway.

[1] The letter also described a second unit, PrimeFlight's employees at Terminal A at Newark Airport that were providing baggage handling, skycap, and checkpoint services for JetBlue, but this unit is not at issue here.

DISCUSSION

Section 10(j) of the NLRA provides that the NLRB may petition the local district court "for appropriate temporary relief or restraining order" pending the Board's final adjudication of a charge of unfair labor practices. 29 U.S.C. § 160(j). Correspondingly, § 10(j) provides that a district court "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." Id. In the Second Circuit, a two-pronged test is used to determine whether to grant an injunction under § 10(j): "First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd., 247 F.3d 360, 364-65 (2d Cir. 2001).

When factual or legal disputes arise in a § 10(j) proceeding, courts within the Second Circuit are required to give substantial deference to the position of the Regional Director. Courts have often held that § 10(j) relief should be denied only if the court is "'convinced that the NLRB's legal or factual theories are fatally flawed.'" Mattina ex rel. NLRB v. Kingsbridge Heights Rehab. & Care Ctr., 329 F. App'x 319, 321 (2d Cir. 2009) (quoting Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1059 (2d Cir. 1995)). With respect to issues of fact, the Regional Director should be "given the benefit of the doubt" and all factual inferences should be drawn in his favor if the inference is "within the range of rationality." Hoffman, 247 F.3d at 365 (internal quotation marks omitted). Disputes over issues of law are also viewed in the Regional Director's favor: "[O]n questions of law, the Board's view should be sustained unless the court is convinced that it is wrong." Id. (internal quotation marks omitted).

In the instant matter, respondent disputes the NLRA's application to the present dispute and thus both the NLRB's and this Court's jurisdiction under § 10(j); accordingly, before the Court can reach the analysis for a preliminary injunction under § 10(j), the Court must first determine whether jurisdiction is proper under the NLRA.

I. The NLRB Has Jurisdiction over PrimeFlight's Employees at Terminal Five at JFK.

The NLRA's protections extend to workers who qualify as "employee[s]" under § 2(3) of the Act. 29 U.S.C. § 152(3). However, the term "employee," as defined in the NLRA, does not include "any individual employed by an employer subject to the Railway Labor Act." Instead, the Railway Labor Act ("RLA") gives the National Mediation Board ("NMB") jurisdiction over a company and its employees when either that company is a common carrier by air or rail as defined in the RLA, or that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce, referred to as a "derivative carrier" in RLA and NMB parlance. 45 U.S.C. §§ 151, *et seq.*; see, e.g., Airway Cleaners, LLC, 41 NMB 262, 267 (2014). When the company is not directly a carrier, the NMB applies a two-part jurisdictional test to determine whether the company is subject to the RLA as a "derivative carrier." The test asks (1) whether the functions performed by the potential derivative carrier's employees are among those traditionally performed by carrier employees, and (2) whether the potential derivative carrier's labor relations are subject to significant control by the carrier. Cunningham v. Electronic Data Sys., Inc., 579 F. Supp. 2d 538, 541 (S.D.N.Y. 2008); Union of Indus. v. Nat'l Mediation Bd., 139 F. Supp. 2d 557, 561 (S.D.N.Y. 2001).

The NLRB has jurisdiction over the instant dispute for several reasons. First, the NLRB's decision to assert jurisdiction over this case is subject to deference. In so concluding, the Court confronts respondent's position at oral argument that the NLRB is not entitled to Chevron deference on matters related to its jurisdiction. This position is wrong. In City of

Arlington, Tex. v. F.C.C., 133 S. Ct. 1863 (2013), the Supreme Court unequivocally rejected an argument that sought to delineate some fictional boundary between deference to jurisdictional questions and deference to nonjurisdictional questions: "[Q]uestions about the scope of agencies' regulatory jurisdiction . . . are all questions to which the Chevron framework applies." 133 S. Ct. at 1870; see also id. at 1868 ("[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."). The Supreme Court has even rejected this attempt to bifurcate questions of deference in cases involving the NLRB. NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 830, 104 S. Ct. 1505, 1510 (1984) ("[W]e have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here," *i.e.*, "a jurisdictional or legal question concerning the coverage of the [NLRA]."). Here, the NLRB has asserted jurisdiction on the basis that the PrimeFlight employees are not excluded from the NLRA's coverage by operation of the RLA. This determination is supported by both NLRB and NMB precedents, to which the Court also affords deference given that they each reach questions of the agency's jurisdictional coverage. Accordingly, the Court gives deference to the NLRB's position asserting jurisdiction in the instant matter.

Second, it is significant, and subject to deference, that the NMB has, in response to referrals from the NLRB, declined jurisdiction over cases presenting similar factual situations involving airline contractors that provide similar ancillary services. For example, in Menzies Aviation, Inc., 42 NMB 1 (2014), the NLRB referred to the NMB the question of whether Menzies Aviation, Inc., an independent contractor that provides ramp, baggage, and airport

servicing functions to Alaska Airlines, British Airways, and Virgin America, was subject to the RLA. The NMB declined RLA jurisdiction over Menzies, instead finding that although Menzies performed the kind of work typically done by air carriers, the air carriers did not directly or indirectly control Menzies. 42 NMB at 7. See also Airway Cleaners, LLC, 41 NMB 262, 267-69 (2014) (NMB declining jurisdiction over contractor providing cleaning and maintenance to airlines); Bags, Inc., 40 NMB 165, 169 (2013) (NMB declining jurisdiction over contractor providing skycap, wheelchair, and unaccompanied minor services to airlines).

It appears to the Court, as it appeared to the NLRB, that the NMB has, since 2013, ceded jurisdiction over certain airline contractors to the NLRB. See PrimeFlight Aviation Servs., Inc., Case 12-RC-113687, 2015 WL 3814049, *1 n.1 (NLRB June 18, 2015) ("[T]hese cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and that this view is currently extant NMB law."). The NLRB need not continue seeking advisory guidance from the NMB over airline contractors when the NMB has expressed a clear position that it does not have jurisdiction over certain categories of contractors employed by air carriers. Further, it is reasonable that the NLRB "will not refer a case [to the NMB] that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." Spartan Aviation Indus., Inc., 337 NLRB 708 (2002). It is additionally reasonable that the NLRB now affirmatively asserts jurisdiction in these cases, absent evidence that an airline exercises greater control over the contractor than is present in "a typical subcontractor relationship." Allied Aviation Serv. Co., 362 NLRB No. 173, 2015 WL 4984885, *2 (Aug. 19, 2015).

Second, even if the Court were to apply the NMB's two-part test to the present facts, it would nonetheless determine that PrimeFlight is not a derivative carrier and that the NLRB has

jurisdiction. As stated above, the NMB's test asks two questions that both must be answered affirmatively: (1) are the PrimeFlight employees' functions traditionally performed by carrier employees (the "functions factor"); and (2) does JetBlue exercise substantial control over PrimeFlight (the "substantial control factor")? Here, while the answer to the first question is certainly yes, the answer to the second question is resoundingly no.

The Court declines to adopt PrimeFlight's focus on the functions factor to the detriment of the substantial control factor. Although the Court recognizes PrimeFlight's argument that a work stoppage by its employees would halt JetBlue's services, that fact is true of all of the cases in which the NMB declined jurisdiction. In Menzies, Bags, and Airway Cleaners, the NMB found that the services were all typically performed by an air carrier, but it was the substantial control factor that required the NMB to decline jurisdiction.

The substantial control factor turns on whether the airline carrier controls, directly or indirectly, the employer and its employees. Factors routinely considered in this analysis are (i) the control over the manner in which the entity conducts its business, including access to the employer's operations and records; (ii) involvement in hiring, firing, and disciplinary decisions; (iii) supervision and direction of the entity's employees in the performance of their job duties; (iv) influence over the conditions of employment; (v) influence over employee training; and (vi) control over uniform and appearance requirements. See, e.g., Auto. Distr. of Buffalo Inc. & Complete Auto Network, 37 NMB 372, 378 (2010). Not all of the factors must be present to meet the substantial control test, and importantly, it is not a matter of simply asking whether there is influence or involvement – the question turns on the materiality of that influence and involvement.

PrimeFlight unpersuasively argues that, pursuant to their agreement with JetBlue, JetBlue exercises substantial control over nearly every aspect of its JFK operations because all indicia of control are present. However, as stated above, the mere presence of these factors is insufficient, and the overwhelming factual similarities between the instant case and Bags, Inc., where the NMB declined jurisdiction, is instructive in finding the factors insufficiently met.

First, PrimeFlight argues that its employees use JetBlue space in Terminal Five; yet in Bags, the company either leased space or was given space by the airlines it served, and the NMB found this factor materially insufficient. Bags, Inc., 40 NMB at 167. Next, PrimeFlight argues that it builds its employees' work schedules and hours based on the flight schedule JetBlue provides, but similarly, the air carriers' schedules dictated the staffing levels and shift assignments of Bags employees, and the NMB found that insufficient to confer jurisdiction. Id. at 168. Next, PrimeFlight argues that JetBlue tracks the work PrimeFlight performs on a real-time basis to ensure appropriate staffing levels; however, similarly, Bags and Delta had daily conference calls to discuss staffing, and this was insufficient for NMB jurisdiction. Id. at 167. PrimeFlight also argues that JetBlue's Statement of Work imposes rules of conduct to which PrimeFlight employees must adhere, but in Bags, there were also agreements with the carriers that dictated certain standards, including professionalism, competence, and language skills. Id. at 166. Next, PrimeFlight argues that JetBlue has the right to inspect and audit PrimeFlight's books, records, and manuals at all times, as well as to request training records, accident and injury reports, employee grievances, and disciplinary actions; however, similarly and seemingly more controlling, Bags submitted weekly reports to the airline on all issues and accounting, and the carriers had full access to review employee and training records. Id. at 167, 168.

With respect to hiring, discipline, and termination, PrimeFlight argues that JetBlue has the right to demand the removal of an employee from the workplace, and if JetBlue exercises that right, PrimeFlight must terminate that employee. However, PrimeFlight provided the Court with its agreement with JetBlue, and nowhere is there a provision providing JetBlue with such a unilateral right of removal. Petitioner pointed to one provision during oral argument that calls for removal in a very narrow circumstance: if a skycaps employee is found to be collecting revenue outside of the system, JetBlue will request that employee be removed from baggage checking services. However, there is no indication in the agreement that the employee must be terminated; rather, it appears that PrimeFlight can simply transfer the employee to checkpoint or wheelchair services, as the agreement only calls for removal from baggage checking.

The Court found another provision that calls for PrimeFlight to discipline employees, up to and including termination, if the employee causes work stoppages or interferes with JetBlue's ability to provide its services, but even there, the Court notes that the ultimate disciplinary decision is left in the hands of PrimeFlight. With respect to hiring, PrimeFlight has control over personnel decisions: it set up its own hiring process, interviewed employees, and made employment offers without input from JetBlue. Further, PrimeFlight set the rate of pay, benefits, disciplinary procedures, and attendance requirements, among other policies.

Next, PrimeFlight argues that JetBlue supervisors interact with PrimeFlight employees every day and have the authority to direct work; however, similarly, Bags had daily conference calls with Delta managers to discuss wheelchair complaints and any other daily issues, including inadequate staffing, and Bags was to use "best efforts to follow any instructions provided by Delta's designated management representatives . . . regarding the standards, procedures, and practices to be followed." Id. at 167.

PrimeFlight argues that JetBlue provides PrimeFlight employees with radios, wheelchairs, computers, baggage carts, and the technology platforms used by PrimeFlight to provide services, in addition to the locker rooms and breakrooms; yet, in Bags, although Bags owned the baggage carts, wheelchair dispatch handhelds, and the computers for Alaska skycap, Delta provided its curbside skycap computers, bag tag printers, curb podiums, some of the wheelchairs, and the breakroom, and Alaska Airlines provided the curbside check-in podium, curbside space, bag belt, wheelchairs, electric carts for terminals, and breakroom. Id. at 167. There is no significant difference between providing a substantial amount of equipment and all of the equipment such that the jurisdictional question would come out differently.

Next, PrimeFlight argues that it trains its employees initially and recurrently, and that the training includes certain JetBlue curriculum, like policies and initial training. PrimeFlight further provides that its employees are to attend JetBlue meetings relating to safety, new programs, special events, and coordination. But this is also similar to Bags: Bags provided disability and customer service training for all employees, with the air carriers training one Bags employee to train the other Bags employees on certain check-in procedures. Further, in Bags, the air carriers provided all additional training that was required by the FAA. Id. at 166-67.

Finally, PrimeFlight argues that it had to receive approval from JetBlue's branding department regarding PrimeFlight's uniform, and that if PrimeFlight seeks to change the uniform, it needs to get approval from JetBlue. However, in Bags, the airlines and Bags stipulated personal appearance standards and the airlines had to approve the uniforms, as well. Id. at 167, 169. Furthermore, in both cases, PrimeFlight and Bags employees were not held out as carrier employees; their uniforms clearly identified them as PrimeFlight and Bags, respectively.

In each of the factual situations in Bags, the NMB found that the presence of the factors was "insufficient to establish jurisdictional control without additional evidence of material control by a carrier." Id. at 170 (emphasis added). It is this material control that the Court finds lacking here, as well. PrimeFlight may claim that JetBlue has provided work specifications, but these specifications are not sufficient to create RLA jurisdiction. Airway Cleaners, 41 NMB at 268; Bags, Inc., 40 NMB 165, 166-67 (2013). Accordingly, the Court finds that the NLRA properly controls.

II. The NLRB Is Entitled to a Preliminary Injunction Against PrimeFlight.

Having found that the NLRA controls, the Court can now determine whether a preliminary injunction is warranted. As stated above, in this Circuit, a two-pronged test is used to determine whether to grant an injunction under § 10(j): "First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." Hoffman, 247 F.3d at 364-65.

A. There Is Reasonable Cause to Believe that PrimeFlight Has Committed Unfair Labor Practices.

The Second Circuit has stressed that a district court may find "reasonable cause" under the first prong of the § 10(j) standard without making a final determination whether the conduct in question constitutes an unfair labor practice. Silverman, 67 F.3d at 1059. In fact, the threshold for finding "reasonable cause" has been analogized to the threshold for making out a *prima facie* case, and courts have held that the Regional Director need only "come forward with evidence 'sufficient to spell out a likelihood of violation.'" Blyer v. Pratt Towers, Inc., 124 F. Supp. 2d 136, 143 (E.D.N.Y. 2000) (quoting Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, 494 F.2d 1230, 1243 (2d Cir. 1974)).

In the instant case, the issue of whether there is reasonable cause to believe that an unfair labor practice occurred hinges on determining whether PrimeFlight is a Burns successor and was therefore obligated to recognize and bargain with the Union in good faith as of the date of the demand letter. For the reasons set forth below, the Court finds it likely that PrimeFlight was a Burns successor on May 23, 2016, and that its conduct amounted to unfair labor practices.

The Supreme Court held in NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 92 S. Ct. 1571 (1972), that if a new employer "voluntarily [takes] over a bargaining unit" of its predecessor, then the successor employer is under a duty to bargain with the union that represented the predecessor's employees. Burns, 406 U.S. at 287, 92 S. Ct. at 1582.[2] Under Burns, the obligation to recognize and bargain with an incumbent union exists when there is (i) "substantial continuity" between the predecessor and successor enterprises, and (ii) when a majority of the employees of the successor, in an appropriate unit, had been formerly employed by the predecessor. Burns, 406 U.S. at 280-81, 92 S. Ct. at 1578-79. In a later case, the Court further explained that determining whether a new company is a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43, 107 S. Ct. 2225, 2236 (1987).

The Supreme Court has made it clear that Burns successorship is based on an employer's voluntary choice to hire more than fifty percent of its workforce from its predecessor's workforce. See Fall River, 482 U.S. at 41, 107 S. Ct. at 2234-35 (explaining that the

[2] The Court inquired particularly on the topic of PrimeFlight's decision to "voluntarily [take] over [the] bargaining unit" of Air Serv during oral arguments. PrimeFlight claimed that it did not have any knowledge that Air Serv employees were unionized when it made its bid. Accepting PrimeFlight's argument that the bid process did not require the same kind of due diligence as a merger, the Court still has a hard time understanding how PrimeFlight failed to make at least a first-level inquiry as to the employees' bargaining status – maybe not at the bid stage because it was not clear then that PrimeFlight intended to hire Air Serv employees, but certainly in April when PrimeFlight communicated with Air Serv about encouraging its employees to apply to PrimeFlight. Surely then, PrimeFlight could have asked whether Air Serv employees were unionized. Moreover, if PrimeFlight failed to ask that question, then it is even harder to say that PrimeFlight, as a successor, did not "voluntarily [take] over" a unionized workforce when it paid no attention to whether the employees it was hiring were unionized.

successorship doctrine is based on the "conscious decision" of the new employer "to maintain generally the same business and to hire a majority of its employees from the predecessor" and that "[t]his makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor"). PrimeFlight is likely a Burns successor because the record indicates that (i) PrimeFlight substantially continued Air Serv's operations in Terminal Five, and (ii) as of May 23, 2016, a majority of the employees that PrimeFlight hired were former employees of Air Serv.

(i) Substantial Continuity

The evidence tends to show that there is substantial continuity between Air Serv and PrimeFlight. The "substantial continuity" inquiry involves assessing several factors:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River, 482 U.S. at 43, 107 S. Ct. at 2236. The test focuses on the retained employees' perspective as to whether their jobs are essentially unaltered. Id. PrimeFlight continued to operate Air Serv's operations in baggage handling, skycap, and checkpoint services in basically unchanged form. The transition between the two enterprises was overnight, with Air Serv concluding its operations on May 8 and PrimeFlight beginning its operations without interruption on May 9. Further, on May 9, the PrimeFlight employees in baggage handling, skycap, and checkpoint services were over 90% the same as those previously employed in those classifications at Air Serv.

Petitioner provided affidavits indicating that, from the employees' perspectives, there was no material difference between their last day at Air Serv and their first day at PrimeFlight, May 8 and May 9, respectively. Baggage handler Denzyl Prince worked on both Air Serv's last day and

PrimeFlight's first day, and he stated that there was no interruption in services between the two companies. Similarly, checkpoint services employee Allison Halley stated that her job remained substantially the same after PrimeFlight took over: She kept the same supervisor, the same shift, and the same duties. Halley further stated that the only difference for her was appearance: She wears a different uniform, her identification says "PrimeFlight" instead of "Air Serv," and she uses a different kind of time clock to log her hours.

PrimeFlight's changes, such as rebranding uniforms and IDs, are minor, considering that the employees are doing the same work they were doing for Air Serv, in the same location, with substantially the same supervision, and with no interruption in service. Although PrimeFlight added another classification, wheelchair assistance, from PAX Assist, that does not alter the analysis: the focus is on the unionized employees' perceptions of their jobs. See, e.g., NLRB v. DeBartelo, 241 F.3d 207, 210-11 (2d Cir. 2001) (holding that substantial continuity "is evaluated principally from the employees' perspective, the crucial question being whether those employees who have been retained will understandably view their job situations as essentially unaltered" (internal quotation marks omitted)).

(ii) Majority Status

Once the substantial continuity test is satisfied, a successor's bargaining obligation requires that a majority of the employees of the successor, in an appropriate unit, were formerly employed by the predecessor. Here, the record shows that as of May 23, 2016, when SEIU made its demand for recognition, 52% of PrimeFlight's employees (189 of 362) had been previously employed by Air Serv and represented by SEIU.

PrimeFlight's response is that on May 23, it had not yet finished hiring, making the NLRB's and the Union's analysis of the composition of its workforce premature. Relying on Fall River, PrimeFlight argues that its bargaining obligation is triggered only if a "substantial and

representative complement" existed at that time. Fall River, 482 U.S. at 47, 107 S. Ct. at 2238. However, the facts underlying the decision in Fall River do not help PrimeFlight. As an initial matter, the Court notes that Fall River dealt with an entirely different situation; there, the Supreme Court confronted a seven-month gap between the end of the predecessor's business and the commencement of the successor's business. In setting the issue for resolution, the Court determined that in Burns, the Court "did not have to consider the question when the successor's obligation to bargain arose: [the predecessor's] contract expired on June 30 and [the successor] began its services with a majority of former [predecessor] guards on July 1." Id. at 47, 107 S. Ct. at 2238. That is the situation we have here, which suggests, in line with Burns, that the obligation to bargain arose on May 9, 2016, but was officially triggered when SEIU requested recognition on May 23.

Even if this Court were to apply the "substantial and representative complement" test found in Fall River, the analysis would still favor the NLRB. Where "there is a start-up period by the new employer while it gradually builds its operations and hires employees," the NLRB and courts have "adopted the 'substantial and representative complement' rule for fixing the moment when the determination as to the composition of the successor's work force is to be made." Id. at 47, 107 S. Ct. at 2238. When fixing that moment, the NLRB examines the following factors: whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. Id. at 49, 107 S. Ct. at 2239.

The rule's application turns on the facts of the case. In Fall River, the Court found Fall River to be a Burns successor because the successor "had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement." Id. at 52, 107 S. Ct. at 2240. Here, on the demand date, PrimeFlight hired people into all four job classifications; it had hired at least 50% in a majority of the classifications, in fact hiring over 90% of the employees in three out of the four job classifications and 56% in the fourth classification; and it employed a majority of the employees it would eventually employ when it reached full complement, 71%, or 362 out of 507 employees.

PrimeFlight's argument that it had not come close to realizing its business goal of increasing its employee complement to at least 500 workers is not persuasive given the lack of support in the record and the standard that this Court draw all factual inferences in favor of the NLRB. PrimeFlight provided an affidavit from its Division Vice President Matthew Barry, stating that on beginning operations, PrimeFlight made the decision to increase hiring to 500. The NLRB disputes this point, arguing that PrimeFlight began to hire in earnest a short three days after receiving the demand letter to avoid its bargaining obligation. The NLRB further presents that as part of the administrative investigation, PrimeFlight produced documentary evidence originating prior to the demand letter and showing discussions about hiring as many as 50 employees in addition to the 362 employees it had already hired. Even if there was no dispute and the Court were to accept PrimeFlight's argument that it intended to hire more workers, this still would only trigger the "substantial and representative complement" analysis, and that analysis still favors the NLRB.

PrimeFlight next argues that July 6, 2016, is the appropriate date to assess collective bargaining obligations because that is when PrimeFlight met its staffing goals. This argument is inherently flawed. PrimeFlight is essentially asking this Court to supplant the "substantial and representative complement" rule with a *per se* "full complement" rule. The Court declines this invitation.

Once majority status is found, a successor's bargaining obligation requires that the unit remain appropriate for collective bargaining under the successor's operations. The NLRB has long held that a single-facility unit is presumptively appropriate and that the party opposing it has a heavy burden to rebut its presumptive appropriateness. See, e.g., NLRB v. HeartShare Human Servs. of N.Y., Inc., 108 F.3d 467, 471 (2d Cir. 1997). Here, the unit is presumptively appropriate because it is a single-facility, wall-to-wall unit of PrimeFlight's employees at Terminal Five at JFK. Although the unit includes the wheelchair assistants, who were unrepresented at the time that PrimeFlight took over operations, this does not destroy PrimeFlight's bargaining obligation. In analyzing a successor's duty to bargain, the NLRB has found units that include previously unrepresented employees to be appropriate, as long as a majority of the unit is comprised of predecessor employees. Good N' Fresh Foods, 287 NLRB 1231, 1236-37 (1988) (finding that successor was obligated to bargain with union as unit comprised of formerly unrepresented maintenance employees and represented production employees); see also NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 871 (2d Cir. 1981) (holding that the NLRB's bargaining unit determinations are rarely to be disturbed unless arbitrary, unreasonable, or not supported by substantial evidence.).[3]

[3] Courts reviewing the NLRB's determinations regarding appropriate units base their analysis on "whether the . . . employees have a sufficient community of interest to be an appropriate unit." Trustees of Masonic Hall & Asylum Fund v. NLRB, 699 F.2d 626, 632 (2d Cir. 1983). A substantial community of interest may be found for units of varying scope, and the NLRB enjoys discretion to select from those possible arrangements in reaching its

A successor employer who satisfies the Burns test but fails to meet its bargaining obligation violates § 8(a)(5) of the Act. Burns, 406 U.S. at 281, 92 S. Ct. at 1579. Those successors who refuse to bargain under their § 8(a)(5) obligation are in violation of both §§ 8(a)(5) and 8(a)(1) of the NLRA. For the foregoing reasons, the Court has reasonable cause to find that PrimeFlight was likely a successor business to Air Serv; that, on the date of the Union's demand letter, previously represented parties were the majority of employees; that the majority was a substantial and representative complement of the full staff reached on July 6, 2016; that PrimeFlight had a duty to bargain with the union; and that its failure to do so likely constituted a violation of the NLRA.

B. Granting Injunctive Relief Against PrimeFlight Would Be Just and Proper.

An injunction is deemed to be "just and proper" when it is "'necessary to prevent irreparable harm or to preserve the status quo.'" Mattina, 329 F. App'x at 321 (quoting Hoffman, 247 F.3d at 368). Although this standard is meant to "preserve[] traditional equitable principles governing injunctive relief," a court should be mindful to apply this standard "in the context of federal labor laws." Hoffman, 247 F.3d at 368. This means that "irreparable harm" should be interpreted with regard to "the policies of the [NLRA]," and actions which undermine these policies can constitute irreparable harm. Id. (quoting Seeler v. Trading Port, Inc., 517 F.2d 33, 40 (2d Cir. 1975)).

In applying these principles, the Second Circuit has concluded that § 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board's processes "totally ineffective" by precluding a meaningful final remedy, or where interim relief

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unit determination. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 610, 111 S. Ct. 1539, 1542 (1991). Neither party raises this analysis; however, based on the community-of-interest factors, the evidence submitted, and petitioner's statements at oral argument that employees were shifted through job classifications, there is reasonable cause to find the unit appropriate, and there is no reason to disturb the NLRB's determination. See, e.g., Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 454 (2d Cir. 1994).

is the only effective means to preserve or restore the status quo as it existed before the onset of the violations; or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint. Kaynard v. Mego Corp., 633 F.2d 1026, 1033-34 (2d Cir. 1980).

Based on the affidavits and briefing provided by the parties, a preliminary injunction is just and proper. There is evidence that there has been a chilling effect on speaking to Union representatives, attending meetings, and voicing support in any meaningful way. PrimeFlight's employees have given sworn affidavits showing that support for SEIU has declined since PrimeFlight began operations.

Because the Court has found reasonable cause to believe that an unfair labor practice occurred and that granting the injunctive relief would be just and proper, the Court will grant the preliminary injunction in part. However, the Court has modified the terms of the preliminary injunction that petitioner has requested so as to prevent respondent from suffering certain unnecessary costs or obligations pending the final determination of the Administrative Law Judge.

D. Terms of the Injunction

For the reasons stated above, a preliminary injunction shall issue. The proposed preliminary injunction language that petitioner submitted to the Court is too broad as it would essentially award petitioner complete and permanent relief to which petitioner is not entitled. The Administrative Law Judge is conducting proceedings and will make his findings of fact and determinations for permanent relief. To ensure that the relief awarded is temporary and contingent on the outcome of the administrative proceeding and to protect PrimeFlight from unduly burdensome obligations and costs, the terms of the injunction will be as follows. First,

PrimeFlight must recognize the Union as the interim collective bargaining representative of PrimeFlight's full-time and part-time JFK employees, excluding confidential employees, office clericals, guards, and supervisors, as defined by the NLRA.

Next, PrimeFlight must engage in good faith collective bargaining with the Union; however, the bargaining is subject to the following limitations: (i) any agreement reached between PrimeFlight and the Union may not include any provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift – PrimeFlight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs, and PrimeFlight will not be forced to needlessly staff and pay employees when there is no need to staff them; and (ii) any agreement reached between PrimeFlight and the Union is subject to termination if the Administrative Law Judge determines that PrimeFlight is not subject to the NLRA or did not violate any provisions in the NLRA. These restrictions will enable the parties to bargain in good faith to facilitate the Union being able to represent PrimeFlight employees in negotiations without sacrificing PrimeFlight's flexibility to assign appropriate coverage to meet JetBlue's service needs.

Finally, PrimeFlight will also provide SEIU with the information requested in its May 23, 2016 letter, including a roster of all bargaining unit employees, applicable employee handbooks, and information pertaining to health insurance and employee benefit plans.

CONCLUSION

The petition for a preliminary injunction is granted in part. The terms of the preliminary injunction as set forth above will be issued separately.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
October 24, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**PRELIMINARY INJUNCTION**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

This matter having come before the Court on the petition of James G. Paulsen is a Regional Director of the National Labor Relations Board ("NLRB") for injunctive relief pending administrative review of an unfair labor practices charge against PrimeFlight Aviation Services, Inc. ("PrimeFlight"), and this Court having rendered its October 24, 2016 Memorandum Decision and Order, granting in part the petition for injunctive relief, it is hereby

ORDERED, ADJUDGED AND DECREED, that PrimeFlight, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, are hereby enjoined, pending the final disposition of the matters involved herein by the NLRB, as follows:

1. PrimeFlight shall immediately recognize the Service Employees International Union, Local 32BJ (the "Union") as the interim collective-bargaining representative of its employees in the following bargaining unit: all full-time and regular part-time employees employed by PrimeFlight at Terminal Five at JFK Airport, excluding

confidential employees, office clericals, guards, and supervisors, as defined by the National Labor Relations Act ("NLRA");

2. PrimeFlight shall immediately commence bargaining in good faith with the Union, subject to the following conditions:
    a. Any agreement reached between PrimeFlight and the Union is subject to termination if the NLRB determines that PrimeFlight is not subject to the NLRA or did not violate any provisions therein;
    b. Any agreement reached between PrimeFlight and the Union may not include minimum shift or employee requirements so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs;
3. PrimeFlight shall, within 10 days of the date of this Preliminary Injunction, provide the Union with the information requested in its May 23, 2016 letter, including a roster of all bargaining unit employees, applicable employee handbooks, and information pertaining to health insurance or other employee benefit plans;
4. PrimeFlight shall, within 10 days of the date of this Preliminary Injunction, post copies of this Preliminary Injunction at all locations where employer notices to employees are customarily posted; maintain such notices free from all obstructions or defacements pending the outcome of the administrative proceeding before the NLRB; and grant to agents of the NLRB reasonable access to PrimeFlight's areas at JFK Airport to monitor compliance with this posting requirement; and
5. PrimeFlight shall, within 20 days of the date of this Preliminary Injunction, file with this Court and serve a copy on petitioner, a sworn affidavit from a responsible official

at PrimeFlight that describes with specificity how PrimeFlight has complied with the terms of this Preliminary Injunction, including the exact locations where PrimeFlight has posted the materials required under this Preliminary Injunction.

SO ORDERED.

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U.S.D.J.

Dated: Brooklyn, New York
October 24, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**MEMORANDUM DECISION AND ORDER**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

Before me is the "emergency" motion of James G. Paulsen, the Regional Director of Region 29 of the National Labor Relations Board (the "NLRB" or the "Board"), made pursuant to Federal Rule of Civil Procedure 59(e), seeking to amend the Preliminary Injunction I entered against respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight") relating to violations of the National Labor Relations Act ("NLRA"). I assume the parties' familiarity with the facts in this matter.

When I granted in part the NLRB's petition for a preliminary injunction under 29 U.S.C. § 160(j) of the NLRA, I tailored the preliminary injunction based on the evidence and arguments the parties presented to me in their papers and at oral argument. I found that the proposed preliminary injunction language that the NLRB submitted was too broad in that it essentially would have awarded petitioner complete and permanent relief to which it was not entitled given the "preliminary" nature of the relief sought. This was particularly the case as I had understood from the parties that they were appearing before an NLRB Administrative Law Judge one week

after oral argument in this matter. Therefore, in determining what was "just and proper" relief under § 160(j) of the NLRA, I determined that any injunction entered would need to be contingent on the outcome of the administrative proceeding.

I also determined that, given the temporary nature of the relief, the preliminary nature of the evidentiary showings, and the ongoing administrative proceeding, it was important to balance the interests of both parties. I determined that giving the NLRB all of what it demanded ignored any balance of interests and that the NLRB's demanded relief would impose on PrimeFlight unduly burdensome obligations and costs. Given these considerations, as well as recognizing that PrimeFlight's staffing needs were dictated by JetBlue's needs and wanting to avoid a situation where bargaining obligations would require PrimeFlight to pay for unnecessary staffing, I limited bargaining between PrimeFlight and the Service Employees International Union, Local 32BJ ("SEIU" or the "Union") to exclude negotiations over "minimum number of shifts per employee or minimum staffing levels per shift" (the "staffing limitation").

I also determined that it was not necessary to include the catch-all language that the NLRB proposed, which sought to enjoin PrimeFlight from "in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act" (the "catch-all provision").[1] I saw no reason for this catch-all provision, which seemed to me to be surplusage.

Nothing in the NLRB's motion makes me believe I have committed error in either imposing the single staffing limitation or declining to include the catch-all provision.

[1] In the NLRB's moving brief, the NLRB appeared to seek the addition of only the language just quoted, but in its reply, the NLRB provided the following, broader proposed language: "Respondent PrimeFlight Aviation Services, Inc., its officers, agents, successors and assigns, shall cease and desist from refusing to bargain in good faith with the Union, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

LEGAL STANDARD

Section 10(j) of the NLRA provides that the NLRB may petition the local district court "for appropriate temporary relief or restraining order" pending the Board's final adjudication of a charge of unfair labor practices. 29 U.S.C. § 160(j). Correspondingly, § 10(j) provides that a district court "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." Id. A preliminary injunction under § 10(j) is deemed to be "just and proper" when it is "necessary to prevent irreparable harm or to preserve the status quo." Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd., 247 F.3d 360, 368 (2d Cir. 2001). This standard is meant to "preserve[] traditional equitable principles governing injunctive relief," and a court should apply this standard "in the context of federal labor laws." Hoffman, 247 F.3d at 368.

Petitioner brings its motion pursuant to Federal Rule of Civil Procedure Rule 59(e) to amend the Preliminary Injunction issued in this matter.[2] Under Rule 59(e), a court may grant a motion to amend a judgment when either (1) "the moving party can demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court," or (2) the movant demonstrates "the need to correct a clear error or prevent manifest injustice." Johnson v. Cty. of Nassau, 82 F. Supp. 3d 533, 535 (E.D.N.Y. 2015) (internal

[2] Respondent argues that petitioner's motion is procedurally defective because Rule 59 is limited to judgments, and there was no judgment in this case. Accordingly, respondent argues that that the instant motion is properly construed as a motion for reconsideration made pursuant to Rule 6.3 of the Local Rules of this Court, which provides that no affidavits can be submitted in support of a motion for reconsideration without leave of the court. That is not quite right. Courts in this Circuit have determined that Rule 59(e) is an appropriate vehicle to amend a preliminary injunction because it is an appealable interlocutory order, see, e.g., Am. ORT, Inc. v. ORT Israel, No. 07 Civ. 2332, 2009 WL 233950, at *2 n. 2 (S.D.N.Y. Jan. 22, 2009); Chobani, LLC v. Dannon Co., Inc., No. 3:16-CV-30, 2016 WL 1664908, at *1 (N.D.N.Y. Apr. 26, 2016), and I will join those courts in finding the same. However, because I am denying petitioner's motion, respondent has not suffered any harm in not submitting a responding affidavit, and I do not see any need to put respondent to the burden of drafting one when petitioner's arguments are insufficient even when considering its additional affidavit.

quotation marks omitted). Petitioner principally moves under the second scenario of the Rule 59(e) analysis, but advises in a footnote that it could move under the first scenario, as well. Petitioner fails to show that the facts merit an amended preliminary injunction under either scenario.

I. The Staffing Limitation Was Just and Proper

The NLRB's main complaint with the staffing provision seems to be that it "forces the Union to concede to Respondent the sole discretion to determine shifts and staffing levels, which are vital terms and conditions of employment that must be determined through the collective bargaining process." This statement is incorrect: Both the Order and Preliminary Injunction explicitly cede discretion for staffing determinations to JetBlue. See Memorandum Decision and Order ("PrimeFlight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs"); Preliminary Injunction (the limitation is "so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs"). As a practical matter, it is reasonable to give JetBlue the authority to determine its own staffing needs given that it is JetBlue that is running its airline.

The NLRB refuses to acknowledge that JetBlue's needs determine staffing levels, instead arguing that the Union should be able to bargain about staffing needs. The NLRB is effectively arguing that JetBlue should not have authority to determine its own staffing requirements and that the Union has better information about JetBlue's needs than JetBlue itself. This argument fails. The staffing limitation appropriately gives staffing authority to JetBlue, which in turn provides that information to PrimeFlight. The Union has no basis to determine staffing levels.

Petitioner also argues that "all or virtually all Union [collective bargaining agreements] contain provisions concerning hours and staffing levels" because of, among other things, the "frequent changes in the volume of work due to seasonality." It is this fluctuation against which

I wanted to guard. PrimeFlight should not have to pay for the same number of employees on Groundhog Day as it does in the days before Thanksgiving, and it seems unjust to me to permit the Union to dictate staffing levels over the needs of JetBlue to the unnecessary expense of PrimeFlight, at least for the temporary period that this injunction covers.

Petitioner also unconvincingly argues that the staffing limitation constrains effective negotiation by the Union because staffing is inextricably linked to other terms, like wages and benefits, and "bargaining requires making compromises in one area to make gains in others." However, the staffing limitation does not impede effective bargaining on other terms, and I am not persuaded that the Union's inability to bargain for unnecessary staffing dooms all other terms of negotiation. As PrimeFlight notes in its opposition, the Union and PrimeFlight may bargain about wages and benefits using historical norms and traditional fluctuations to determine specific classifications. Such a suggestion seems reasonable to me as it permits bargaining over wages and benefits without prospectively requiring PrimeFlight to needlessly staff employees simply because the Union wants to set all prospective staffing levels.

Respondent floats several alternative bargaining proposals, none of which petitioner acknowledges in its reply. Instead, the NLRB categorically asserts that good faith bargaining is not possible because of the staffing limitation. The NLRB's refusal to acknowledge the alternate bases for collective bargaining does not create irreparable harm. The Union has the ability to bargain on behalf of the employees regarding a host of terms, including wages, benefits, grievance and arbitration procedures, contract length, seniority, union security clauses, strikes and lock outs, and management rights clauses, all of which can be negotiated without reference to staffing levels.

Petitioner next argues that my ability to fashion a preliminary injunction that is "just and proper" is limited by statutory language. But none of the provisions and cases petitioner cites suggest that I am without discretion to balance the equities in the context of a preliminary injunction pending final outcome from an administrative agency. In fact, the Circuit has been quite clear that equity should guide my analysis for a preliminary injunction under the NLRA. See e.g. Silverman v. 40-41 Realty Associates, Inc., 668 F.2d 678, 680 (2d Cir. 1982) (holding that "general equitable principles apply in deciding the propriety of a temporary injunction issued under section 10(j)").

In support of this particular argument, petitioner accuses the staffing limitation of giving PrimeFlight a "license" "to refuse to bargain in good faith" under § 8(a)(5) of the NLRA, thereby undermining Congress's policy in passing the NLRA. None of the cases it presents actually support the argument it is making. The NLRB draws from case law holding that "where the legislature has clearly expressed its intent to cabin a court's discretion to fashion equitable remedies, the court must respect those limitations," Beck Chevrolet Co., Inc. v. General Motors LLC, 787 F.3d 663, 680 (2d Cir. 2015), and then cites a quotation from the NLRA's policy statement, excerpted without the context of the previous four paragraphs that outline the particular strife Congress was intending to remedy as between employees and employers. What is conspicuously missing from petitioner's argument is a citation to any provision that cabins judicial discretion in considering what is just and proper for a preliminary injunction. Instead, the NLRB cites to § 8(d), which deals with the general obligation to bargain collectively as between the employer and the union/employees, and again says nothing about the discretion of the court in granting a preliminary injunction under § 10(j).

The fact is that petitioner cannot point to any holding or statutory language that limits a court's ability to fashion a preliminary injunction. Congress did not limit a court's authority to tailor a preliminary injunction; instead, it provided courts with discretion to make determinations as they "deem[] just and proper." 29 U.S.C. § 160(j). In several cases, other courts, as well as this Court, have weighed the equities and fashioned preliminary injunctions that did not provide the NLRB with every aspect of the relief it sought because we found that giving the NLRB everything would inequitably tilt bargaining against the employer and provide the Union a windfall or an unfair advantage in negotiations. See, e.g., Paulsen v. Renaissance Equity Holdings, LLC, 849 F. Supp. 2d 335, 362 (E.D.N.Y. 2012) (declining to reinstate an expired contract and modifying the terms of the injunction rather than "issue injunctive relief that shifts all of the negotiating leverage to the Union"); Blyer v. One Stop Kosher Supermarket, Inc., 720 F. Supp. 2d 221, 228 (E.D.N.Y. 2010) (issuing injunction prohibiting the parties from implementing any collective bargaining agreement until the NLRB had issued a final ruling, noting that the NLRB's requested injunction "might also easily become, as a practical matter, permanent relief if it were to result in a collective bargaining agreement before the NLRB renders its decision," which "would go beyond the interim relief authorized by § 160(j)").

Not only has petitioner failed to show that there is any manifest injustice warranting reconsideration, but petitioner has also failed to highlight any clear error in the Memorandum Decision and Order or any controlling law that I did not consider in support of its argument that the staffing limitation is in error. Petitioner argues that H. K. Porter Co. v. NLRB, 397 U.S. 99, 90 S. Ct. 821 (1970), is controlling law that supports its proposition that both the NLRB and the courts cannot "directly or indirectly compel concessions or otherwise sit in judgment upon the

substantive terms of collective bargaining agreements." 397 U.S. at 106, 90 S. Ct. at 825. However, the language of H.K. Porter on which petitioner relies is inapposite for several reasons.

First, nowhere in the paragraph where that clause appears did the Supreme Court mention the courts. In fact, the entire opinion dealt with the authority of the NLRB to compel either a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement. Petitioner simply drops "courts" into its proposition even though H.K. Porter did not include that. The only mention of the role of the courts pertained to the procedural posture: In H.K. Porter, the Court sat in review of a Board decision that the Court of Appeals affirmed. In that respect, the courts were implicated because the Court of Appeals should not have affirmed, but the crux of the argument related to an attempt by the NLRB to compel the employer's assent to certain terms in the collective-bargaining agreement.

Second, the Supreme Court discussed the legislative history of the NLRA as it pertained to examples of overreaching by the NLRB, not the courts. In fact, in discussing § 8(d), the Supreme Court recognized that "it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." Id. (internal quotation marks omitted and emphasis added).

Finally, H.K. Porter did not deal with or at all consider the courts' role in awarding § 10(j) relief, nor did it at all discuss any form of interim, temporary, or preliminary relief; rather, it reviewed the NLRB's improper attempt to force an employer to assent to a term in the context of a permanent collective-bargaining agreement.

What is really happening here is that the NLRB is attempting to use § 10(j) to pressure PrimeFlight into an agreement under which it will pay union workers for time in which they are not working. I recognize that there are collective bargaining agreements that contain such terms.

And it may be that the final collective bargaining agreement reached between PrimeFlight and the Union will be one of them. But this is a § 10(j) injunction proceeding, and its purpose is to maintain the status quo, not to moot the proceedings that are before the Administrative Law Judge and which may be reviewed by the Second Circuit. Requiring PrimeFlight to pay for unworked hours is not a term that, in my view, would be "just and proper."

Accordingly, petitioner has not presented any controlling law or other law that I overlooked nor identified any clear error that warrants reconsideration under Rule 59(e).

II. Excluding the Catch-All Provision Was Not Error

Petitioner's argument with respect to the catch-all provision is also unavailing. Without demonstrating any harm or violation by PrimeFlight (and thus no reason to require any additional relief), petitioner moves this Court to add in language that enjoins PrimeFlight from "in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act," later revising its request to the Court in its reply to include language that PrimeFlight "cease and desist from refusing to bargain in good faith with the Union, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

Petitioner argues that including the catch-all provision ensures that respondent will take its NLRA obligations seriously and discourages recidivism. Missing from this argument in petitioner's moving brief and reply is any indication that PrimeFlight is not taking its obligations seriously or is on the cusp of recidivism. Also missing from the reply is any indication that PrimeFlight has refused to bargain in good faith, apart from the NLRB's proposition that the staffing limitation makes good faith bargaining impossible, which I already rejected. From my review of the affidavit that I ordered PrimeFlight to file relating to its compliance with the Preliminary Injunction, it is clear that PrimeFlight is taking its obligations to this Court seriously.

I reject petitioner's argument that simply because other "courts routinely grant it" and add this language to their preliminary injunctions that there is any reason or merit to including it here. I also reject petitioner's argument that I should add the catch-all because adding in the language will not impose additional costs on PrimeFlight. Cost is not the analysis; the analysis is what is just and proper, and it is not just and proper to impose a broad, undefined obligation on PrimeFlight when there is no evidence nor even a suggestion that PrimeFlight's conduct requires such a broad injunction. For these reasons, the NLRB's motion is also denied with respect to amending the Preliminary Injunction to add the catch-all provision.

CONCLUSION

For the reasons stated above, the NLRB's motion is denied.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
December 13, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**MEMORANDUM DECISION AND ORDER**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

Before me is the motion of respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight") for a stay of the Preliminary Injunction issued in this matter under § 10(j) of the National Labor Relations Act ("NLRA"), pending PrimeFlight's appeal to the Second Circuit. I assume the parties' familiarity with the facts of this case. For the following reasons, PrimeFlight's motion is denied.

In this Circuit, a court considers the following factors in determining whether to stay a judgment or order pending appeal: (1) that the movant is likely to succeed on the merits of its appeal, (2) that there will be irreparable injury in the absence of a stay, (3) that other interested parties will not be substantially harmed if the stay is granted, and (4) that the stay is in the public interest. In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007). PrimeFlight has not demonstrated the presence of any of these factors.

First, PrimeFlight has not offered any new legal arguments to support a showing that it is likely to succeed on the merits of its appeals. Rather, it makes the same arguments related to the

Court's jurisdictional finding, discounting the shift in the National Mediation Board's position that contractors of the same type as PrimeFlight are not covered by the Railway Labor Act. While PrimeFlight points me in the direction of a D.C. Circuit appeal currently *sub judice* on the jurisdiction issue, it does not provide me any new precedents or analyses that merit undertaking a reconsideration of my previous Order.

PrimeFlight similarly argues the same points it did regarding my finding on successorship under Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43, 107 S. Ct. 2225, 2236 (1987), specifically that there is reasonable cause to find that PrimeFlight was likely a successor to Air Serv. PrimeFlight's disagreements with my application of the facts to the legal test, without more, are not sufficient to merit reconsideration, as I have already considered respondent's arguments when it raised them the first time in opposing the preliminary injunction.

Second, PrimeFlight has not offered any concrete examples of irreparable harm if the stay is not granted. Instead, PrimeFlight abstractly argues that its right to choose not "to recognize and bargain" is under attack, as are the rights of the employees who did not elect to have the union represent them. Neither argument is persuasive when balanced against the harm expressly prohibited in the NLRA. Here, I found that there was reasonable cause to believe that unfair labor practices had occurred, and I deemed a preliminary injunction to be a just and proper *and temporary* remedy given the pending hearing before the Administrative Law Judge.

Third and related to the previous point, PrimeFlight's argument that the union will not be harmed by the stay is unpersuasive and is undercut by the observations I made in granting the Preliminary Injunction, specifically that there was reasonable cause to believe that PrimeFlight engaged in anti-union practices that chilled union activity, as supported by affidavits testifying to employee fears of being seen speaking to union representatives, attending meetings, or voicing

support in any meaningful way. PrimeFlight's motion does not acknowledge these aspects of third-party harm in its motion.

Fourth, PrimeFlight argues that the public interest favors a stay because the public is not served by a potential labor dispute. This is not sufficient. In passing the NLRA, Congress found that the public interest favors the protection of employee rights from unfair labor practices, and PrimeFlight has not shown how the risk of a potential labor dispute supersedes my observation that reasonable cause existed to believe that PrimeFlight had committed unfair labor practices.

When I balance the equities between PrimeFlight and the employees, giving due consideration to Congress's intent in passing the NLRA, the text of the Act, and the facts presented here, I find that the harm of the employees being unrepresented for a year or more is greater than having PrimeFlight engage in good-faith bargaining. Moreover, the Preliminary Injunction itself balances the equities between PrimeFlight and the union by imposing a limitation on bargaining over staffing levels in an effort to avoid imposing unduly burdensome obligations and costs on PrimeFlight. Therefore, there is no basis for a stay of the Preliminary Injunction, and PrimeFlight's motion is denied.

SO ORDERED.

U.S.D.J.

Dated: Brooklyn, New York
December 29, 2016